REPORT

OF THE

ATTORNEY GENERAL

OF THE

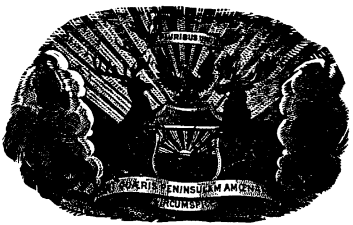
STATE OF MICHIGAN

FOR THE

YEAR ENDING JUNE 30, A. D. 1893

ADOLPHUS A. ELLIS

ATTORNEY GENERAL



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REPORT.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 1, 1893.

To the Governor and Legislature of the State of Michigan:

In compliance with the statutes of the State of Michigan I have the honor herewith to submit the annual report of the Attorney General of all business transacted by this department from July 1, 1892 to July 1, 1893, including an abstract of the reports of the prosecuting attorneys of the State, showing the criminal prosecutions, disposition of cases and other items pertaining to the administration of justice.

The various matters embraced in said report are particularly covered and referred to in the schedules hereto attached from "A" to "J" inclusive.

1. Schedule "A" contains a full statement of all criminal cases brought to the Supreme Court on exceptions, writ of error or *certiorari*, which are disposed of or pending, and in which the Attorney General has appeared or assisted by making briefs or otherwise.

In preparing this schedule I have given a short statement of the facts, the point in dispute and the decision of the court thereon. The same general plan was adopted in the report for this office of 1891 and 1892, and it was found that the full statement of each case was of much assistance to the prosecuting attorneys of the several counties, by furnishing them a ready reference to the points decided by the Supreme Court in criminal cases during the preceding year.

2. Schedule "C" contains a list of *mandamus*, *quo warranto* and other proceedings instituted by the Attorney General in behalf of the State or commenced by other parties, in which the State is directly interested.

The decisions in these cases involve, to quite a large extent, the construction of statutes of the State, and are of general interest to the people. In order that a full understanding might be had of the matters at issue, the report states the point and the decision of the court.

3. Schedule "D" contains a list of chancery cases commenced or completed between July 1, 1892 and July 1, 1893, and cases now pending in which the State is directly interested.

The questions decided in these cases are of State importance, and in order that those who desire to inquire into the matter may have a complete understanding of each case, I have in this report made a statement sufficiently full to disclose the point at issue and the decision of the court thereon.

4. Schedule "E" contains a list of *quo warranto* and other special proceedings authorized by the Attorney General in the name of the State, but directed by and at the expense of parties interested.

In this schedule, like the three preceding, I have given briefly a statement of the facts of the case and the rulings of the court, if decision has been rendered.

5. Schedule "F" contains a list of chancery cases commenced in the various circuit courts in chancery in which the state is somewhat interested.

The usual practice in such cases is that where a State officer is made a party defendant, which is often the case where the proceeding is commenced in relation to tax matters, the subpœnas are referred to the prosecuting attorneys of the various counties and the cases are left in their charge. The tax law expressly provides that it shall be the duty of the prosecuting attorney to look after cases relative to tax proceedings, and as the prosecuting attorney is not required to furnish any report of such matters, this office has no information relative to such suits except it be obtained on special inquiry.

6. Schedule "G" contains a list of insurance companies where the articles of association of such companies or the amendments to such articles, or extension of the charter has been examined and approved by the Attorney General in pursuance to law, between July 1, 1892 and July 1, 1893.

Under the law as it previously existed no fee was charged for that class of work. The Legislature of 1893, by act 151 provided that "each and every mutual insurance company hereafter incorporated and each company which shall hereafter renew its articles of incorporation or amend the same, where such articles of incorporation, renewal or amendment are required by law of the State to be approved by the Attorney General, shall pay to the Attorney General for the use and benefit of the State of Michigan, an approval fee of five dollars," which approval fee shall be by the Attorney General paid into the State Treasury. The act will take effect August 28, 1893.

7. Schedule "H" contains an abstract of the reports of the prosecuting attorneys for the year ending June 30, 1893. Showing the number prosecuted in the State for each particular offense between the first day of July, 1892 and the first day of July, 1893, with the results of such prosecutions.

8. Schedule "I" contains the addresses of the prosecuting attorneys, and the number of persons prosecuted, number convicted, number acquitted, number dismissed on payment of costs, number *nolle prossed*, number discharged on examination and the number settled or otherwise compromised, in each county, between the first day of July, 1892 and the first day of July 1893. In this schedule all offenses are classified together. The disposition or result of each particular offense will be found in the aggregate of all the counties in schedule "G."

9. Schedule "J" contains the opinions written by the Attorney General during the fiscal year.

The number of formal opinions given was not as great as in the previous year. This is accounted for by the fact that the year after the annual session of the Legislature demands a great deal more of the time of the Attorney General for such purpose than the year prior to the meeting thereof.

The Legislature usually adjourns about the time of the commencement of the fiscal year and many of the laws do not take effect until ninety days after such adjournment, and very shortly after the adjournment of the Legislature there is a great demand upon the time of the Attorney General for the interpretation of the laws lately passed. It is not infrequent that the members of the Legislature who passed the laws are among the first to ask for their interpretation.

The change in the law in 1891 requiring the prosecuting attorneys to make briefs in all criminal cases and to only assist in the Supreme Court when specially requested so to do by the Attorney General, has proved of great value to the State in the way of cutting down the expense in the hearing of cases in the Supreme Court.

So far as I know, the various State institutions and the several State departments have carried out the letter and spirit of the law passed by the Legislature of 1891, requiring State work, appertaining to this department, to be done by the Attorney General, or under his supervision, and the State has not been called upon to pay for outside help.

Every State department, except that of the Attorney General, is allowed, under the law, to appoint a deputy at an expense of two thousand dollars per year, and besides this to appoint as many clerks as such departments deem necessary, such extra clerks to be paid at the rate of not exceeding one thousand dollars per year each. For some unaccountable reason the legal department of the State has continually been discriminated against by the Legislature. The head of this department has never been authorized by law to appoint a deputy, and no one is legally authorized to act officially for the Attorney General in his absence, while the clerk hire in this department is limited to a given amount, the total amount that can be expended in any one year being three thousand dollars.

There is no good reason known to me why the Legislature should not give the legal department the same right and authority as is vested in the other State departments. There can be no question in the mind of any person who has taken any time to investigate the matter, but what, under existing law, the head of the legal department has to do very much more work than is required of any other State officer.

Hon. Moses Taggart, one of my predecessors, recommended to the State Legislature a change in the law, authorizing the Attorney General to appoint a deputy, and during the last session of the Legislature a bill was introduced for that purpose; but the bill, while it was favorably recommended by the committee on judiciary, was allowed to die in the hands of one of the subsequent committees.

The policy pursued by the State of Michigan in relation to its legal department for years past has been what is denominated in common language as "penny-wise and pound-foolish." It is impossible under the existing law for the Attorney General to reach all of the cases and legal matters of the State, and the only alternative is to either have them neglected or pay large fees to private counsel to conduct such matters.

There is no good reason why the work appertaining to this department should not be done the same as it is done in the other departments of the State, by State employés who are paid a reasonable compensation for their entire services for the State; and inasmuch as my term of office will expire before the next session of the Legislature, and I can have no personal interest in the matter, I desire to go upon record as urging upon the next Legislature in the interest of this department, the passage of a law, giving to the Attorney General of the State of Michigan the same right to appoint a deputy; and also the right to control the State business of this department the same in every respect as the business in the other departments is controlled by the other State officers in charge thereof.

In addition to the regular work usually required of the Attorney General, by direction of the Governor, the Attorney General has assisted in trying what are known as the Molitor cases, tried at Alpena, resulting in the conviction of five men for murder in the first degree for the killing of Albert Molitor in the county of Presque Isle in the year 1875. These cases were originally brought in the county of Presque Isle, and on failure to procure a jury were transferred to Alpena county. The time consumed in the trial, and which required the attendance of the Attorney General, was between fifty and sixty days.

A brief account of the circumstances surrounding the commission of the offense will be found in schedule "B."

Respectfully submitted,

A. A. ELLIS,
Attorney General.

SCHEDULE A.

This schedule contains a full statement of all criminal cases brought to the Supreme Court on exceptions, writ of error, *certiorari* and *habeas corpus*, whether disposed of or pending, in which the Attorney General has appeared, or which are of general interest to those entrusted with the administration of the criminal laws of the State.

The People *vs.* Ida Peterson. Error to Menominee county. Murder. Reversed and new trial ordered.

The respondent, in September, 1887, was convicted in the circuit court for the county of Menominee of the crime of manslaughter, and sentenced to the Detroit House of Correction for the period of thirteen years. The information charged her with the murder of her husband, Alfred Peterson, on January 30, 1887, at Baldwin, in the county of Delta. Two trials were had before a jury in Delta county, and in each case the jury disagreed. Upon application of the prosecuting attorney of Delta county, the circuit judge of that county granted a change of venue to the county of Menominee.

The first question upon the record was whether or not the court had jurisdiction upon the application of the State to grant the order transferring the case out of that county into another county for the purpose of trial.

The constitution article 6, sections 27 and 28, provide that the right of trial by jury shall remain, and that in every criminal prosecution the accused shall have the right to a speedy and public trial by an impartial jury. Howell's Statutes section 6468, provides that each circuit court on good cause shown, may change the venue in any cause pending therein, and direct the issue to be tried in the circuit court of another county, and that, when there shall be a disagreement of the jury on the trial of any criminal cause in the circuit court to which the cause was ordered for trial, the circuit judge before whom the same was tried, if he shall deem that the public good requires the same, may, on cause shown by either party, order and direct the issue to be tried in the circuit court of another county. *Held*, that the circuit court in its discretion may order a change of venue on the application of the State in a criminal case, on the ground of local prejudice in the county where the case has once been tried and the jury disagreed, and where the indictment was returned.

On the trial it appeared that deceased, who was the husband of defendant, was killed by a blow on the head. A witness for the State on direct examination, stated that after the murder defendant had said to her: "Well, nobody saw me when I struck the blow. How are they going to prove it against me? I guess I am all right, as they didn't see me do it."

On cross-examination such witness stated that the exact language was: "I guess I am all right yet, for they cannot prove it, when no one saw me do it." *Held*, that this was no confession of guilt, and it was error for the court to instruct the jury that "any statements made by the respondent voluntarily are very important for you to consider. If she made the statements as testified to by" such witness, "it is, of course a virtual admission of the killing of her husband; if she did not, of course that testimony goes for naught."

In the case it appeared that an axe, with which the murder was committed, was found in the snow; that there were no tracks leading near to it; that it might have been thrown from one part of the path from the house in which the act was committed, or from another path; and there was evidence that the distance was so great that defendant could not have thrown it. *Held*, that it was error for the court to refuse to instruct the jury that, "if the axe was thrown such a distance as they are satisfied the defendant could not throw it, then that should satisfy them that the defendant is not guilty," and instruct them that they should weigh such fact, and "it would be a strong circumstance" to show that the defendant was not guilty.

Reported in 52 N. W. Rep., page 1039, 93 Mich., 27.

The People *vs.* Thomas Betts. Error to Kalamazoo. Breaking and entering building in night time. Reversed and new trial ordered.

Respondent was tried and convicted in the Kalamazoo circuit court for breaking and entering a flouring mill in the night time with intent to commit larceny. He was charged in the complaint with two others, who were separately informed against, tried and convicted at the same term before the respondent's trial came on. It was claimed that the court was in error in compelling respondent to go to trial before the jury of that term, for the reason that the trials of the others worked a prejudice against him. There was nothing in the record showing that any juror was prejudiced or incompetent to try respondent's case. *Held*, that error could not be predicated on the fact that defendant was obliged to go to trial before the jury of the term that had tried and convicted his two accomplices.

On the trial the people were permitted to show by defendant's wife who was called as a witness, but who did not appear to have any knowledge of the offense or of defendant's connection with it, that he had left her; that he had another wife living; and that he got drunk and abused her. *Held*, that such testimony was prejudicial to defendant and reversible error.

Reported in 54 N. W. Rep. 487, 94 Mich. 642.

The People *vs.* William Hodgkin. Error to Sanilac. Sodomy. Reversed and new trial ordered.

The respondent was informed against under section 9292, Howell's Statutes, and convicted of the crime of sodomy. The circuit judge instructed the jury that the evidence of the offense was complete upon proof of penetration only. The defendant assigned error upon this instruction, which assignment presented the only question which the court deemed necessary to consider. The statute does not, in terms, define what shall constitute the offense.

Held, that the repeal by revised statutes 1846, page 730, of the act of 1841, which provided that it shall not be necessary in sodomy to prove emission, proof of penetration being sufficient, revived the common law in force prior to the passage of the act of 1841, and made emission a necessary ingredient of the offense, which ingredient, though it may be inferred from penetration and other circumstances, must be made out by the prosecution in order to convict.

Reported in 53 N. W. Rep., page 794, 94 Mich., 27.

The People *vs.* James P. Roe and James Pitton. Error to Superior Court of Grand Rapids. Violation of liquor law.

In this case the fine and costs were paid by the defendant in the lower court, and appeal waived.

The People *vs.* John B. Hughes. Error to Superior Court of Grand Rapids. Violation of liquor law.

In this case the fine and costs were paid by the defendant in the lower court and appeal waived.

The People *vs.* Ephraim G. Kenyon. Error to Kent county. Assault and battery. Reversed and new trial granted.

Kenyon was convicted of assault and battery upon one Matthias Miller in the Kent circuit court, upon appeal from justice court. He came to the Supreme Court upon exceptions before sentence. It was insisted in the justice court, as well as in the circuit, that the justice had no jurisdiction, because no return of the warrant was ever made in the justice court. It appeared that a warrant was issued upon a proper complaint, and that it was served by a deputy sheriff, and the respondent arrested and brought before the justice by virtue of it. The return appeared upon the warrant in proper form, but was not signed by any one. The objection was made before the justice that he had no jurisdiction because the return was not signed, and overruled by him.

Held, that the omission to sign the return on a warrant did not affect the jurisdiction of a justice, where it appeared that defendant was arrested and brought before him by an officer with a lawful warrant, and pleaded not guilty, and made no motion to dismiss until the adjourn day, nearly a week after his arraignment.

The assault and battery grew out of a visit by the prosecuting witness to defendant's home to present to him a petition to establish a drain. The witness testified on direct examination that he presented the same petition to the drain commissioners, but afterwards filed another. *Held*, that the court properly refused to permit defendant to ask the witness, on cross-examination, if the commissioners did not refuse to act on the first petition, since the fact was irrelevant.

Held further, that it was error to subsequently allow the people to show why the first petition was abandoned and another drawn up and circulated.

Held further, that it was not error to refuse to compel the production of the petition, since it was irrelevant.

On the trial the people were permitted to investigate minutely all the defendant's past quarrels and litigations, but the same latitude was not allowed to the defense in his examination of the complaining witness as to his quarrelsome disposition, and as to how many fights he had been engaged in while a resident of the State. This was held to be error.

The people rested their case without calling one Marie Gould as a witness. She was sworn as a witness for the prosecution in justice court, and it was claimed she saw part of the affray.

The defendant moved that the prosecuting attorney be requested to call Mrs. Gould. The circuit judge declined to do so upon the ground that he had no power to compel the people to call her. Held to be error.

Also held that a judgment for damages, recovered in a civil action for assault and battery, is not a bar to a criminal prosecution against the plaintiff therein, since both he and defendant may have been guilty, and that where an attempt is made to discredit the testimony of a justice by showing that his docket was written at two different times, with different colored inks, it is proper for the attorney on the opposite side to point out that the different shades of ink corresponded with the several times of adjournment.

Reported in 52 N. W. Rep., page 1033, 93 Mich., 19.

The People *vs.* James H. Harris. Error to Wayne. Aiding in the concealment of stolen property. Affirmed.

Defendant was tried on an information containing two counts; the first for the larceny of a horse, and the second for aiding in concealing it, knowing it to have been stolen. The evidence showed that he knew it was stolen, but was not present when it was taken; that he had been actively engaged in assisting his associate to sell it; that he represented to some persons that it was his, and to others that it belonged to his associate; that, when arrested, he claimed to the sheriff that "we bought the horse," and, again, that his associate owned it. *Held*, that the evidence was sufficient to sustain a verdict of guilty under the second count.

Reported in 53 N. W. Rep., 780, 93 Mich., 617.

People *vs.* Henry Beach. Error to Oceana county. Violation of the liquor law. Reversed and new trial ordered.

The complaint alleged in this case that defendant, not being a druggist, sold liquor at retail without having paid the tax, posted up the notice or given the bond required by law.

The testimony showed that defendant was a druggist, but failed to show that he had not filed a bond as such. The conviction was set aside.

The defendant was complained against as Dr. Beach and on his examination gave his name as Henry Beach and was so informed against.

Held, that evidence taken at the examination was admissable for the purpose of showing this fact.

Reported in 52 N. W. Rep., page 1035, 93 Mich., 25.

The People *vs.* Frank A. Weithoff. Exceptions from Recorder's Court of Detroit. Keeping gaming room. Affirmed.

The respondent was prosecuted under section 2029 of Howell's Statutes, the information charging that the said respondent did, for hire, gain and reward, keep and maintain a gaming room, contrary to the provisions of said section.

Defendant occupied a room, kept a telegraph operator therein, and, for a commission paid by any person, telegraphed to Guttenberg, N. J., the amount of money the person desired to bet on a horse in any race there. An order was signed by the person desiring to send the money, stating that he made defendant his common carrier, and put in his charge the money to be placed on the horse therein named; the day of the race, the place and the odds that would be accepted, being also specified in the order. A blackboard was kept in the room, on which was recorded at brief intervals the position of the horses in the race. If the person betting won, he received the money in the room, and, if he lost, the knowledge of the loss was brought to him there. *Held*, that this constituted a gaming room, within the meaning of Howell's Statutes section 2029, providing that any person who shall, for hire, gain or reward, maintain a gaming room, shall be deemed guilty of a misdemeanor.

Reported in 53 N. W. Rep., 784, 93 Mich., 631.

The People *vs.* William Edwards. Error to Ionia county. Possession of burglar's tools with intent to use the same. Affirmed.

The respondent was convicted for violation of section 9175 of Howell's Statutes, providing a punishment for having in possession any implement adapted to breaking open any building in order to steal therefrom, knowing the same to be adapted thereto, with intent to use the same. The respondent insisted that no conviction could be had under this statute unless the information charged, and the evidence showed, the particular building intended to be broken into, and who was the owner of it.

The court held that it is not necessary for the State to allege or prove the particular building intended to be broken open, or who is the owner of it.

Reported in 53 N. W. Rep., 778, 93 Mich., 636.

The People *vs.* John Handley. Error to Lenawee county. Arson. Reversed and prisoner discharged.

The respondent was informed against in the Lenawee circuit court, and charged with having set fire to and burned "a certain brick dwelling house," the property of William Anderson. The information appeared to have been drawn under section 9123 of Howell's Statutes. The proofs did not show that the building was the dwelling house of Anderson, but that it was only a vacant house, owned by said Anderson.

It was held:

1. A vacant house is not within Howell's Statutes, section 9123, providing for the punishment of one who shall willfully and maliciously burn in the night time the "dwelling house" of another.

2. An acquittal of a charge of burning a "dwelling house," under Howell's Statutes, section 9123, is not a bar to a trial for the same offense under Howell's Statutes, section 9127, providing for the punishment of one who shall willfully and maliciously burn any building, other than a dwelling house, belonging to another.

3. Where defendant, waiving examination, is bound over to the circuit court, and is informed against under Howell's Statutes, section 9123, for the burning of a dwelling house, the information cannot afterwards be amended so as to charge him with burning a building of another, other than a dwelling house, under Howell's Statutes, section 9127, which is a different crime, and subject to a different penalty.

Reported in 52 N. W. Rep., page 1032, 93 Mich., 46.

The People *vs.* Lorenzo D. Foote. Error to Allegan county. Forgery. Affirmed.

The respondent was convicted of having uttered a false, forged promissory note. He waived examination before the justice. The objections raised to the information and conviction were: (1) The information does not follow the warrant, in that the warrant charges the offense to have been committed November 18, 1890, while the information charges it as November 18, 1889; also that the note is described in the warrant as signed by "L. D. Foote & Co.," while in the information it is described as signed by "L. D. Foote." (2) The court erroneously permitted one Newham, an attorney, to assist the prosecution upon the trial. (3) The court erroneously permitted the people to show upon the cross-examination of the respondent that he had been arrested for another crime. (4) The court erred in not delaying the trial to permit respondent to secure the attendance of two witnesses.

1. *Held*, that the first claim was not a proper ground of objection to the information, when the same discrepancy existing between the warrant and complaint was not objected to, and the warrant contained a copy of the note dated November 18, 1889, and from the fact that the complaint was sworn to May 23, 1890, the date November 20, 1890, was an impossible one, and evidently a mere clerical error.

2. That it was within the discretion of the court to permit a business associate of the prosecuting officer, who was not employed by any private party for the purpose, and had no interest in the matter, to assist in the prosecution.

3. It was permissible, as affecting his credibility, to show, on cross-examination of defendant that he had before been arrested for another crime.

4. It was within the discretion of the court in a criminal case to permit or refuse a delay for the purpose of procuring witnesses.

Reported in 52 N. W. Rep., page 1036, 93 Mich., 38.

The People *vs.* Mathew Murphy. Error to Van Buren county. Violation of local option law. Reversed and new trial ordered.

The respondent was convicted in the Van Buren circuit court on an information charging that he did on the 28th day of November, 1891, "then and there sell and furnish to one Myron C. Dolbie a certain quantity

of spirituous and intoxicating liquors, to wit, one-half pint of brandy, he, the said Matthew Murphy, not being a druggist or registered pharmacist selling such liquor under and in compliance with the restrictions and requirements imposed upon druggists and registered pharmacists by the general laws of the State of Michigan, but contrary to the provisions of a certain resolution adopted by the board of supervisors of the county of Van Buren, State of Michigan, on the 4th day of March, A. D. 1890, in pursuance of the provisions of Act No. 207, Public Acts, of 1889; the aforesaid sale and furnishing of said spirituous and intoxicating liquors having then and there been made by said Matthew Murphy in violation of and contrary to the provisions of said Act No. 207 of the Public Acts of the State of Michigan for the year 1889."

Act 207 is the "Local Option Law," so-called, and the first question raised upon the record was whether a druggist who fails to comply with the requirements of the law, by filing his bond with the county treasurer, is subject to prosecution under this act. Section one of the act makes it unlawful to sell intoxicating liquors in any county where the act is in force, but provides that the section shall not apply to druggists, in selling such liquors under the restrictions imposed upon them by the general laws. Section two provides that, on the adoption of a resolution by the board of supervisors of a county prohibiting the sale of liquors, the general laws relating to the liquor traffic shall be suspended and superseded, but that all sales of liquors by druggists in such counties shall be under the restrictions imposed upon them by the general laws. The general law requires a druggist to file a bond before selling liquor. *Held*, that a druggist who sells liquor without filing a bond is rightly prosecuted under the local option law, rather than under the general laws.

Section 13 of the local option law requires a resolution of the board of supervisors of a county prohibiting the sale of liquor to be spread in full upon the journal of their proceedings, and to set forth in the preamble the fact that an election submitting the proposition of prohibition was duly called and held in the county, and the result of such election. Section 17 provides that on a trial for the sale of liquor in violation of the act "it shall be competent to introduce the record, or a * * * transcript thereof, of the preamble and resolution of the board of supervisors, * * * and such record and transcript shall be the evidence that the provisions of this act are in full force within such county." *Held*, that a resolution of the board of supervisors of a county prohibiting the sale of liquor, but with no preamble reciting that an election was duly called and held, and the result thereof, is not sufficient evidence that the act was in force in the county to sustain a conviction for its violation.

Held further, that the fact that a witness bought liquor of defendant for the purpose of prosecution, if the prosecuting officers were not concerned in the purchase, is not cause for exclusion of the testimony of the witness, but merely effects his credibility.

Reported in 52 N. W. Rep., 1042, 93 Mich., 41.

The People *vs.* Carl J. Quanstrom. Error to Muskegon county. Bigamy. Reversed and prisoner discharged.

Respondent was convicted of bigamy, and the sole question in the case was whether a complaint for bigamy may be made by the first wife. Our

statutes provide that a wife cannot testify against her husband "except in cases where the cause of action grows out of a personal wrong or injury" done to her, and in other cases not here necessary to be mentioned. It is also provided that "in any action or proceeding instituted by the husband or wife in consequence of adultery, the husband and wife shall not be competent to testify." Howell's Statutes, section 7546. The complaint for bigamy in this case was made by Marie Quanstrom, the alleged lawful wife of the respondent. He was tried and convicted of the crime of bigamy upon such complaint. It was claimed that his lawful wife was not competent to make the complaint, and that he should be discharged for that reason.

Held, That bigamy on the part of a husband is not such a "personal" wrong or injury to the wife as to allow her to testify against the husband in a criminal prosecution under the above statutes, and hence the wife could not make the complaint.

Reported in 53 N. W. Rep., 165, 93 Mich., 254.

The People *vs.* Charles E. Taylor. Error to Kalamazoo county. Larceny from building in day time. Affirmed.

The respondent was convicted of entering the barn of one Hugh Frazier, in the daytime, with intent to commit the crime of larceny. Certain errors were alleged which were duly considered by the court:

1. At the opening of court, on the first day of the term, the names of the jurors were called, and the judge gave them some preliminary instructions on their duties as jurors.

Held, that it is proper for a trial judge at the beginning of the term to caution the jurors that they should not talk with any person about any case which is to be tried, nor listen to any conversation of others in regard thereto.

2. It was next insisted that the proofs did not show that the crime was committed in the daytime.

On the trial the owner testified that on the night previous to the discovery of the theft he was in the barn at nine o'clock, and fastened the doors. The wool was then there, but about sunrise he found twelve fleeces stolen. It appeared that a short distance from the barn a horse had been hitched and fed with hay, and it could be inferred that it stood there for some time. There was evidence that the prisoner drove to the house of one of the witnesses that morning, after daylight, and asked to put some bags in the house. *Held*, that a verdict that the entry to the barn was made after daylight would not be disturbed.

3. Defendant's counsel contended that there was no sufficient identification of the property stolen.

Twelve fleeces were taken and the same number was found in the possession of defendant next day. When defendant took the wool to a dealer to sell he was informed that twelve of Frazier's fleeces had been stolen, and he acknowledged that he had taken them, and desired to settle the matter. After his arrest he made no effort to recover the wool or its value. *Held*, that identification of the property stolen with that in defendant's, possession was complete.

4. Several witnesses testified to confessions made by the respondent. The evidence on the part of the people tended to show that these confessions were made voluntarily, and not under any threats, duress, or promises. The testimony was held competent.

Reported in 53 N. W. Rep. 777, 93 Mich., 638.

The People *vs.* John Kahler. Error to Hillsdale. Violation of liquor law. Reversed and new trial ordered.

Respondent was convicted of selling liquor to a minor. In the complaint made to the justice the name of the county was left blank in the venue, but the complaint was made before a justice of the peace in the city of Hillsdale, and alleged the offense to have been committed in that city.

Held, that a complaint made before a justice of the peace having jurisdiction thereof, within the city where the offense is alleged to have been committed, is not void because the name of the county is omitted.

The warrant, in describing the offense alleged that respondent "did then and there unlawfully sell, furnish and deliver to one Albert R. Rogers, who was then and there a minor under the age of twenty-one years, to wit of the age of eleven years, a large quantity of, to wit, spirituous liquors to wit, beer." It was insisted that the material fact to be proved was the sale of spirituous and intoxicating liquors to a minor, and that the warrant was bad because of the use of the *videlicet* preceding the word "spirituous." This objection was overruled.

Dr. Werner, a physician, was called for the defense, and testified that he had been called by the boy's mother to visit him while he was recovering from the effects of the beer.

The first question asked upon cross-examination was: "You are in the habit of drinking, are you not?" This question was objected to as incompetent and irrelevant. The objection was overruled, and an exception taken. "Answer. I am in the habit of drinking beer when I want it."

Held, that on a trial for the unlawful sale of intoxicating liquor, the fact that a witness is in a habit of drinking beer does not affect his credibility, and the admission of evidence of that fact is error."

Held further, that on a trial for the unlawful sale of liquor, it is error for the prosecuting attorney to say of defendant's witness, in addressing the jury, he "has admitted that he drinks, and I don't know that a man who drinks is any more to be believed than the man who sells the liquor."

Held further, that in such case it is error for the prosecuting attorney in addressing the jury, to say of defendant: "You know what to expect of a man engaged with such a thing. You understand this saloon business,—what to expect of them."

Reported in 53 N. W. Rep., 826, 93 Mich., 625.

The People *vs.* Ephraim Harris. Error to Sanilac. Murder. Reversed and new trial awarded.

Respondent was informed against for murder, and was tried and convicted of manslaughter. The defense was justifiable or excusable homicide. The parties lived upon adjoining farms, and the affray occurred in the highway, at about nine o'clock in the morning. Deceased was 23 years of age, weighed 180 pounds, was nearly six feet in height, and was strong and muscular, while the accused was but 16 years of age. The killing was done with an ordinary pocket knife.

Upon the examination of the accused the defense sought to show not only the general reputation of the deceased for quarrelsomeness, but the violence of his temper and conduct when in anger, and defendant was asked to give instances or specific acts of violence within his knowledge,

or coming under his own observation, but the court excluded the testimony.

Held, that it was proper under the plea of self-defense, for defendant to show not only the general reputation of deceased for quarrelsomeness, and the violence of his temper when in anger, but also particular instances of violence within defendant's knowledge or observation, as justifying in defendant a reasonable apprehension of danger.

Mr. Harris was one of the witnesses of the affray. His name was upon the information. He was called by the prosecution to testify upon the preliminary examination. Upon the trial he was called to the stand by the people and sworn. The prosecuting attorney then announced, "No examination." The defendant's counsel insisted that, as the witness was an eye witness to the affray, it was the duty of the prosecuting attorney to bring out his knowledge concerning it.

Held, that the fact that defendant's father, though named in the information, and testifying on the preliminary examination, was not examined by the prosecution, could not be complained of by defendant, where the father saw only a part of the affray, and the prosecution had already called the mother, who claimed to have seen it all, and where also defendant's rights had been fully protected by his own examination.

On a question as to who was the aggressor the court held that the circuit judge should have instructed that, if deceased was quarrelsome, or had made threats against defendant, or entertained any vindictive feelings, or had a motive for assailing him, these facts were to be considered, and that, if defendant did not begin the affray, but stood on the defensive, and deceased, in a violent and angry manner attacked defendant, and defendant, fearing the attack, took out his pocketknife, and, backing away from deceased, endeavored to avoid a conflict, the deceased following and grappling with him, and defendant, acting on the belief arising from all the circumstances that he was in danger of his life or great bodily harm, used the knife, defendant should be acquitted.

An objection to a witness in a criminal case because his name does not appear on the information, comes too late after the witness has been summoned and examined.

Reported in 54 N. W. Rep., 648, 95 Mich., 87.

The People *vs.* Thilo Kuehn. Error to St. Clair county. Murder. Reversed and new trial granted.

The information filed in this case charged the respondent with the murder of Wesley McDonald on September 15, 1891, at the township of Port Huron, in St. Clair county. Upon the trial he was convicted of murder in the second degree, and sentenced to the State Prison at Jackson for the period of 22 years.

There was evidence tending to show that the respondent was at his house, when three persons, among whom was the deceased, hearing that respondent had been whipping his wife, went to investigate the matter.

A controversy then arose between all the parties, and it is evident from the record that they were all very much excited. The respondent was given to understand that these men supposed that he had been whipping his wife, and that they were angry and indignant because of it, and in the excitement of the occasion he insisted that McDonald threatened to kill him, and he so testified; that he was afraid that he would do so; and

that, while McDonald was advancing upon him in an angry and threatening manner, he shot and killed him. The respondent insisted upon the trial that at the time of the shooting he honestly believed that his life was in danger, or that he was in danger of great bodily harm, and that the shooting was necessary in order to save himself from such threatened danger. Upon this point the circuit judge charged the jury as follows: "This man had a right to defend his home, including his curtilage, if he thought there was immediate danger of his being assaulted at the time, and the shooting of the man was the only way to get rid of that assault. Still, he had no right to kill him, except when he goes into the house and locks the door."

This was held to be error and the case was reversed on this ground.

Reported in 53 N. W. Rep., 721, 93 Mich., 619.

The People *vs.* Ralph Williams. Error to Saginaw. Assault and battery. Affirmed.

The respondent was arrested upon a complaint and warrant issued by a justice of the peace, charging an assault with intent to do great bodily harm. He waived examination before the justice and was bound over for trial in the circuit court. He was informed against in the circuit, the information containing two counts,—one for assault with intent to do great bodily harm less than the crime of murder; and the second for assault and battery. He pleaded not guilty, and went to trial before a jury, who convicted him under the second count.

It was insisted that inasmuch as no testimony was taken before the justice, and no assault and battery charged in the complaint, that the prosecuting attorney had no authority to include that charge in the information.

Held, that when defendant plead not guilty and went to trial, he must be considered as having waived an examination on the count charging assault and battery.

Reported in 53 N. W. Rep., page 779, 93 Mich., 623.

The People *vs.* William H. Wade. Error to Hillsdale. Violation of liquor law. Affirmed on default.

The People *vs.* William Hamilton. *Certiorari* to justice of the peace. Bastardy. Affirmed.

Defendant, being brought before a justice of the peace upon a charge of bastardy, filed a plea in abatement, alleging in substance, that he was at the time of his arrest under recognizance to appear before the circuit court upon another charge for the same cause, made before the same magistrate; that he had appeared at the circuit court, and obtained a continuance of said cause, which had never been tried or otherwise disposed of. The facts upon which said plea was predicated were stipulated to be as follows, viz.: "That the prior proceedings were, upon complaint made by the same complainant, and for the same identical cause as the case at bar; that defendant appeared at circuit court, at the term mentioned in the recognizance, but subsequently made default; that the recognizance was forfeited; that, on application of the prosecuting attorney, the circuit court ordered a capias to issue to apprehend the defendant, and bring him into court for trial; but that no further proceedings appear to have been

had in said cause." It was further stipulated "that said cause was pending, unless the same was abated or was discontinued by the default and entry of these orders." The justice disregarded the plea, and committed the defendant upon failing to comply with his order to file a recognizance for his appearance at circuit court.

Howell's Statutes, section 2005, relating to bastardy proceedings, provides that a justice of the peace must issue his warrant against the party accused and, after hearing him, may require him to enter into a recognizance for his appearance at the circuit court. *Held*, that the pendency of prior bastardy proceedings, on complaint of the same complainant, and for the same cause, was no bar to an examination on a second complaint.

Reported in 54 N. W. Rep., 874.

The People *vs.* Orrin Curtis. Error to Ingham. Violation of liquor law. Affirmed.

The respondent was convicted of a violation of the provision of the liquor law which prohibits sales of liquor by druggists to be drank on the premises.

The information recited that defendant, being a druggist, did sell a quantity of spirituous liquor, called "brandy," to one Shoemaker, to be used as a beverage, and which was drank on the premises by Shoemaker and others, is sufficient under 3 Howell's Statutes, section 2283*c6*, providing that it shall be unlawful for any druggist to sell spirituous liquor to any person to be used as a beverage and to be drank on the premises, though the information failed to show negatively that defendant was not licensed to keep a saloon under other sections of the statute.

Howell's Statutes section 9466, provides that the magistrate before whom any person is brought for committing an offense not cognizable by a justice of the peace shall examine the complainant and witnesses on oath. *Held*, directory as to the quantity of testimony to be taken, and means only that he shall receive such testimony from the complainant and his witnesses as may be offered.

The court refused to instruct that defendant could not be convicted if he was entrapped into making the sale by a detective, though the public authorities were in no way concerned in setting the trap. This charge was sustained as correct.

A witness, who had on the day of the sale driven Shoemaker from another town to defendant's place of business, was asked whether he had to bring suit to recover for his services, and answered that he sued the prosecuting attorney. *Held*, that the court properly struck out the testimony, since it was not sought to show by the witness who in fact employed him, and since such testimony was incompetent to prove that the prosecuting attorney had any part in the employment of Shoemaker.

Reported in 54 N. W. Rep., 767, 95 Mich., 212.

In the matter of Bertha Gates. *Certiorari* to Lenawee county. Prisoner discharged.

This was a *habeas corpus* proceeding in the circuit court to inquire into the cause of the detention of Bertha Gates at the State Industrial Home for Girls, at Adrian. The commitment, issued by a justice of the peace,

recited that she was complained against before said justice for larceny; that a trial was had, and the cause "submitted to the jury, and after being out for a time, they returned, and said they find that the said Bertha Gates is guilty in the manner and form so charged against her, and is of the age of ten years and eight months. The return showed that the detention was upon the naked warrant. The warrant contained no certificate as to age, nor was the report of the county agent attached thereto.

Howell's Statutes section 9836, requires the court or magistrate sentencing a person to the Industrial Home for Girls over the age of ten years and under seventeen to certify to the keeper the age of such person as nearly as can be ascertained by testimony taken under oath before him, or in such manner as he shall direct. Section 9895 provides that the report of the county agent shall be attached to the mittimus. *Held*, that a commitment was void where no report of the county agent was attached, and it only recited the verdict of the jury that "they find" such person is over ten years of age.

Reported in 53 N. W. Rep., page 914, 93 Mich., 644.

The People *vs.* August Wolf. Error to Ontonagon. Murder. Affirmed.

The respondent was convicted of murder in the first degree. The name of the murdered man was August Smith. Wolf had been employed by one Kleinlein, who had located a homestead in Ontonagon county, to clear some land at an agreed price per acre. April 5 he employed Smith to work with him. Smith worked there until he was killed, April 14. The appearance of the body indicated that death was produced with a deadly weapon, such as an axe.

Mrs. Kleinlein, under objection and exception by respondent's counsel, testified that about a couple of weeks before the murder, Wolf said he "must hustle up to get some money;, that he was going to get married; that one month's wages would take him to buy his sweetheart some clothes; another month's work would buy him some clothes." On the day of the murder, while eating dinner, Mrs. Kleinlein said to Wolf: "I wonder if Smith has his dinner. Perhaps the poor man ain't got any money, and he run a long while without anything to do," Wolf replied: "He has his dinner on the crossing. He got money on the crossing." After his arrest Wolf wrote a long letter, detailing the circumstances of the killing of Smith, and charging that it was done by a stranger, in his presence; that the stranger spared his life only upon condition that he would leave the State within twenty-four hours, should stay away ten days, after which he might return and tell everything; that he told the stranger that he did not have money enough to get out of the State so quick; that he had $11 belonging to Smith, and he did not want to keep it; that he then took the money that Smith had given him, put it on the stump, and told the stranger to give it to Smith; that the stranger took the money, put it in his pocket, and then gave wolf $15. Counsel for respondent contended that there was no evidence to sustain the verdict, because there was no proof of previous deliberation or premeditation. *Held*, that deliberation and premeditation can be inferred from the character of the weapon used, the wounds inflicted upon vital parts, the circumstances surrounding the killing, the acts, conduct and language of the accused before and after the killing, and the improbability of the story told by him.

Error was assigned upon the following portion of the charge: "In some instances proof of the intent is furnished by the manner of the killing itself; as, when the murder is shown to have been committed with a deadly weapon, or a dangerous weapon, in such a manner that an inquiring mind can come to no other conclusion than that the death of the victim was intended." Also, "In such cases the law presumes every person to intend the usual consequences which accompany the use of the means employed in the manner employed, and casts upon the accused the burden of showing that the intention in using the weapon was harmless, or not murderous."

Held, that the burden of proving his innocence was not, by this charge, placed upon the accused.

The testimony of Mrs. Kleinlein in regard to her conversation with Wolf about money was held competent. The court declared that they could not say, as a matter of law, that it had no bearing upon the motive for the murder. It may have been weak, but it was for the jury to determine what weight they should attach to it.

The respondent testified that, when the stranger attacked Smith, Smith had just finished filing the cross-cut saw at a stump. One Leo Gleisnar testified that on the day following the murder he was present when the body of Smith was found; that he examined the saw; that two or three teeth were newly filed, and one tooth had two or three strokes of the file upon it, and that the rest of the teeth were dull. On cross-examination the witness said that if the saw had been used between the time that Smith was killed and the time he saw it the marks of filing would have been obliterated. Counsel for the respondent then moved to strike out the testimony of this witness in regard to the filing of the saw. The court then said: "He should only speak of the appearance of it." Respondent's counsel then asked the witness the question: "You only know what the appearance was, I suppose. Answer. Yes, sir; I can tell the teeth of a saw,—whether they were newly filed or whether they were not. Three or four of them had been just filed, and had not been used." *Held*, that the court did not err in refusing to strike out the testimony.

Reported in 55, N. W. Rep., 357, 95 Mich., 625.

The People *vs.* Claud Harrison. Error to Bay county. Larceny. Affirmed.

The respondent was convicted upon an information charging him with the larceny of $31 dollars, the property of one Louis Johnson, during the summer of 1891. The respondent claimed that the circuit judge erred in deciding that there was sufficient evidence to warrant the jury in returning a verdict of guilty. The record did not disclose that he did so, except to hold that there was some evidence to go to the jury in relation to the guilt of the respondent, and this evidence was submitted to them in a fair and impartial manner by the circuit judge, with an instruction that the evidence must convince them beyond a reasonable doubt of the guilt of the respondent, or they must acquit him. *Held*, that as there was evidence of that character, it was clearly a question for the jury, and the circuit judge was right in submitting it to them.

On the trial a witness for the people admitted that, though not the wife of defendant, she had been living with him as such, and was so doing when she testified that he committed the offense charged. On cross-examination,

to show her bad moral character, she was asked if she had ever been married or ever had a child; if she had not been in a family way in her mother's house, some time ago, and if she did not have a child there. To each question she answered "No." The court refused to permit any further questions in that line. *Held*, that the court did not abuse its discretion.

The counsel for the people, in his argument to the jury, insisted that they had the right to consider why defendant did not go to his father to obtain money he needed, concerning which testimony had been given; whether his failure to do so was because he knew his father had no confidence in him, and whether that lack of confidence was due to his idle habits or vagabond life; and that a son brought up by an honest and respectable father, should be as certainly convicted, if guilty of a crime, as if he were the son of the greatest rascal in the community. *Held*, that such remarks did not reflect unjustly on the character of defendant.

It was also claimed as error that the circuit judge instructed the jury that they could take into consideration the character of the respondent as bearing upon his guilt or innocence.

Held, that it is proper to charge the jury that they can consider the character of defendant as bearing on his guilt or innocence, and whether a person with a good character would be less liable to be guilty of crime than a person of bad habits and character.

A witness for the people, under arrest for the same charge, testified that she was present when the larceny was committed; that she protested against its commission, and had nothing to do with it, but received a part of the money. *Held*, that it was proper for the court to charge that it is for her interest to show that somebody else was the guilty party, and, if the jury find from the evidence that she and defendant together stole the money, that would not relieve defendant, but both would be guilty.

Reported in 53 N. W. Rep. 725, 93 Mich., 594.

The People *vs.* David J. McWhorter. Error to Kent. Rape. Reversed and new trial ordered.

The respondent was convicted of the crime of rape.

The court charged the jury substantially that if the evidence of the prosecution satisfied the jury beyond a reasonable doubt that the respondent was guilty, then they should examine the evidence for the defendant, for the presumption of innocence was then removed, and the burden was on the respondent to restore the original presumption of innocence.

Held, erroneous, since in criminal trials the burden of proof does not shift, but is on the people during the whole trial.

Reported in 53, N. W. Rep., 780, 93 Mich., 641.

The People *vs.* Michael K. Mills. Error to Washtenaw. Carnal knowledge of girl between fourteen and sixteen years of age. Affirmed.

Respondent was convicted of having carnal knowledge of Bernice Bickle, theretofore chaste, of the age of fourteen years and not more than sixteen years, with her consent.

Bernice was fourteen years of age in January, 1892. She had lived in Sarnia until December 21, 1891. Her father and mother were members of a sect styling themselves "Israelites," and respondent claimed to be the

leader of that sect, with headquarters at Detroit. In October, 1891, he was at Sarnia, preaching at the home of Bernice. On that occasion Bernice was induced to play on the piano and sing for the respondent, whereupon respondent said to her mother that she should play the piano at headquarters.

On the trial Bernice testified on cross-examination that a written statement made by her had been prepared by the prosecuting attorney, who told her to sign it. *Held*, that she might properly be re-examined to show that the statement was in her own language, that no threats or inducements had been held out to her in regard to it, and that she had not been asked to say anything therein that was not true.

Prosecutrix and another witness, both of whom were members of this religious sect or community of which respondent was the leader, disclosed on cross-examination certain statements relative to respondent's conduct inconsistent with their testimony. *Held*, that they might properly be re-examined as to the circumstances under which such statements were made, as that they had been made while witnesses were under the influence of respondent, submission to whose desires they have been taught involved no wrong.

Held further, that it was proper to show also on cross-examination of other witnesses, the relations between them and respondent, their credulousness, and how they would be influenced in their estimate of what was right or wrong by what respondent might say, and their idea of the character he represented.

It was held proper for the prosecution to show by a witness called to establish respondent's purity and loving kindness that respondent had on a certain occasion tied his wife's hands, and confined her in a room, because she was violent and rebellious, and that such conduct of the wife was due to jealousy on account of respondent having other women in the house.

The name of a well-known police officer, who was conspicuously present at the trial, and whose name had been frequently mentioned in the testimony was by inadvertance omitted from the information. *Held*, that he might be examined, notwithstanding this inadvertant omission of his name from the information.

Lack of chastity cannot be shown to impeach the credibility of a female witness.

A girl of fifteen, who has led a virtuous life for six or seven years, is notwithstanding possible unchastity before that time, within Laws 1887, Act No. 143, declaring a penalty against any one who shall carnally know a girl of that age "theretofore chaste."

Reported in 54 N. W. Rep., 488, 94 Mich., 630.

The People *vs.* Albert Metzger impleaded with Edward Heslan. Exceptions from Recorder's Court of Detroit. Violation of liquor law. Affirmed.

By the information the respondent, together with one Heslan, was charged with having been engaged in the business of selling and keeping for sale spirituous liquors without having paid the tax required by law. The information also contained the other necessary averments. On the trial it appeared that Heslan had paid a tax upon the business of selling

malt liquors to the amount of $300, but that the additional tax of $200 for engaging in the business of selling spirituous liquors had not been paid. Two sales made by respondent of spirituous liquors were shown; but Heslan was not present at the time, and knew nothing of the sales having been made by him. The court directed an acquittal of Heslan. Respondent's counsel then requested the court to direct the jury that if they found that respondent had no interest in the saloon business, and was merely an employé working for weekly wages, he was not carrying on the business of selling spirituous liquors as charged, and must be acquitted. This was refused. Respondent was convicted and the case came up on exceptions before sentence.

Held, that under section seven of Act 313 of the Laws of 1887 which provides that it shall be unlawful for any person to engage in the business of selling spirituous liquors without the payment of a tax, a conviction can be had for selling two glasses of whisky, even though defendant was the servant of one who paid the tax for the sale of malt liquors, as by section two of the act all persons who sell any spirituous liquors by the drink are retail dealers.

Reported in 54 N. W. Rep., 639, 95 Mich., 121.

In the matter of Robert Trimble. *Habeas corpus*. Killing deer out of season.

The petitioner was confined in the county jail for the offense of killing deer out of season at the township of Sault Ste. Marie, in the county of Chippewa, in the Upper Peninsula of Michigan, on the 12th day of November, A. D. 1891, contrary to the provisions of act 152 of the Public Acts of 1891. It was claimed that the imprisonment was illegal for the reason that at the time at which the petitioner killed the deer, the killing of deer was permitted by the above act throughout the State. This claim was based upon the fact that the word "only" was omitted in the last line of section one of the above act, and by reason of such omission there were two hunting seasons in the Upper Peninsula, during which deer might be lawfully killed. This view of the statute was not sanctioned by the court as the order to show cause was denied. See also Attorney General's Report for 1892, page 110.

The People *vs.* Frank Steele. *Certiorari* to Ionia circuit judge. Larceny. Reversed and prisoner discharged.

The respondent was convicted in justice court of the larceny of property of the value of three dollars. He waived a trial by jury and demanded to be tried by the court without a jury. The court, against his protest, ordered a jury. The sole question was whether respondent possessed the right, under our statutes, to choose the mode of trial.

Howell's Statutes section 7097, provides that in criminal prosecutions in justice courts, if no jury is demanded by the accused the court shall proceed to try the issue. Section 7099 provides that, if the accused shall not have waived his right to trial by jury, a jury shall be summoned.

Held, that the statutes give the accused his choice of two modes of trial; and it was error for the court to order a jury against his protest, after he has demanded a trial by the court without a jury.

Reported in 54 N. W. Rep. 171, 94 Mich., 437.

The People *vs.* Charles Smith. Error to Recorder's Court of Detroit. Receiving stolen property. Affirmed.

The respondent was convicted of receiving stolen property, under section 9142, Howell's Statutes. The information charged that the property taken was of the value of one dollar; was the property of one William J. Plackett, and that it had been stolen. The respondent, upon arraignment, pleaded not guilty, and proceeded to trial without any objections to the form of the information. He was sentenced to the State Prison for five years.

Howell's Statutes, section 9535, provides that every objection to an indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash before the jury shall be sworn and not afterwards. *Held*, that the objection cannot be raised for the first time on appeal that an information for receiving stolen property did not allege when, where or by whom the larceny of the property was committed.

Held further, that an information for receiving stolen property need not allege the time and place of the theft.

Howell's Statutes, section 9142, provides a maximum penalty of five years in prison for receiving stolen property. *Held*, that this law does not violate section 31, article six of the constitution forbidding cruel and unusual punishment, though the maximum penalty for the larceny of the same property is only one year's imprisonment.

Howell's Statutes, section 9143 provides that if a party convicted for the first time of receiving stolen property makes restitution, and the act of stealing is simple larceny, he shall not be imprisoned in the State Prison. *Held*, that defendant must show to the trial court before sentence, a compliance with these conditions.

Reported in 54 N. W. Rep., 487, 94 Mich., 644.

The People *vs.* Frank Westbrook. Error to Saginaw. Indecent assault. Reversed and prisoner discharged.

Defendant was convicted of an indecent assault upon the person of his daughter, a girl of nine years of age. The warrant was based upon a written complaint made by defendant's wife, who was also allowed to testify against him at the trial, upon the part of the people, without his consent.

Held, that the commission of this offense is not such a "personal" wrong or injury to the wife as to allow her to testify against the husband in a criminal prosecution. People *v.* Quanstrom, 93 Mich., 254 followed.

Reported in 54 N. W. Rep., 486, 94 Mich., 629.

The People *vs.* George C. Jackman. Exceptions from Marquette. Libel. Reversed and new trial ordered.

The respondent was convicted of criminal libel under Act 210 of the Public Acts of 1885.

The complaint and warrant alleged the publication of three articles in the issues of defendant's newspaper, upon three consecutive days.

The theory of the prosecution was that these articles taken together charged the complainant with a disgraceful act, viz., of being at a house of

prostitution in Wisconsin. The defendant's counsel claimed that each publication constituted a separate and distinct charge.

The first article was intended to charge that plaintiff had had an arm broken under dishonorable and disgraceful circumstances. The second publication was intended to charge that the plaintiff bore upon his person the marks of adventures at institutions of disreputable character. The third publication intended to charge that the statement of one Dr. Goerrs that plaintiff's arm had been broken while he was being ejected from a house of prostitution, was true.

Held, that each publication charged a disgraceful act, within the meaning of the statute, and the information was therefore open to the objection of duplicity.

Reported in 55 N. W. Rep., 809.

The People *vs.* Wilbur Fynn, impleaded with Lemuel Allen. Error to Kalamazoo. Rape. Affirmed.

The defendant was convicted of the crime of rape.

The alleged victim, Lizzie Schroeder, together with one Minnie Elbans, attended a dance together where they met the defendants.

The theory of the prosecution was that the young men induced these girls to permit them to take them to the girls' homes in a buggy, but that instead of doing so they went in another direction. The Elbans girl jumped out of the buggy and escaped, but the Schroeder girl was forcibly taken to a secluded place and subjected to sexual intercourse by both of the young men under threats of personal violence.

The defense claimed that the intercourse was voluntary.

The statement of the Elbans girl as to what she heard after she got out of the buggy, and as to which way the buggy went, were held competent as a part of the *res gestae*.

The girls were taken to the sheriff's office and in the presence of respondent made certain statements to the witness as to why she did not refuse respondent. The respondent admitted the fact of intercourse, and did not deny the statements of the girl.

Held, that these statements made in the presence of respondent in connection with his failure to deny them, were admissible, and might be testified to by the witness.

The court instructed the jury that if Flynn aided and assisted Allen to commit the rape upon this girl, he was guilty of the offense. This was held to be a correct statement of the law.

Reported in 55 N. W. Rep., 834.

In the matter of William H. Wade. *Habeas corpus*. Petitioner remanded.

The petitioner was arrested on the 11th day of February, 1892, for violating the provisions of the general liquor law. On the 16th day of February he was bound over to the circuit court and a plea of "Not guilty" was entered by the court at the March term. At the September term of said court he was placed upon trial and convicted. On December 7, 1892, he was sentenced to the county jail for the period of ninety days.

By virtue of a certain preamble, resolution and order, adopted by the board of supervisors of said county on the 7th day of March, 1892, act number 207 of the laws of 1889, commonly known as the local option law, went into effect in said county on the first day of May, 1892. It was insisted by the defendant that his trial and sentence, having taken place after the local option law went into effect in said county, they were for that reason illegal and void. The court denied the writ and remanded the petitioner to the custody of the sheriff. No opinion was filed.

The People *vs.* Warren Miller. Error to Clare. Rape. Affirmed.

The defendant was convicted of assault with intent to commit rape upon a girl of less than fourteen years of age. The proof consisted of testimony from the girl, who unequivocally testified to the complete act of sexual intercourse, testimony from a physician showing an examination and rupture of the membrane, testimony of one or two witnesses to admissions on the part of defendant to the effect that he had intercourse with the girl on the occasion charged, and testimony that she was, at the time, below the age of fourteen years, and that she had been subject to menstrual periods for a year. The defendant was sworn and denied seeing the girl upon the occasion charged.

The court charged the jury that the defendant might be convicted of rape, of assault with intent to commit rape, or of simple assault. *Held*, that under the proof, a verdict of assault with intent to commit rape would be illogical, but that an assault with intent to commit rape is necessarily included in every rape, and the error, if it was one, resulted in defendant's advantage, and he could not complain of it.

It was claimed that the defendant having denied the transaction, the jury should have been charged that there must be some testimony corroborating that of the girl, or the verdict must be "Not guilty." *Held*, that the charge of the court not being given it would not be presumed that the subject of corroboration was not properly treated in the charge. The court also intimated that convictions in rape cases can be based upon the uncorroborated testimony of the woman assaulted.

It was next claimed that the jury should have been directed to return a verdict for the defendant, because the girl had reached the age of puberty. *Held*, that under section 9094, 3d Howell's Statutes, it is sufficient if the victim is under the age of fourteen years.

Reported in 55 N. W. Rep., 675.

The People *vs.* William Hennesy. Exceptions from Superior Court of Grand Rapids. Violation of liquor law.

This case was settled by defendant paying his fine in the lower court, and waiving his appeal.

The People *vs.* Irving Adams. Error to Van Buren. Violation of local option law. Affirmed.

Respondent was convicted for selling fermented cider, contrary to the provisions of a resolution adopted by the board of supervisors of the

county of Van Buren in pursuance of the provisions of Act No. 207 of the Laws of 1889, and contrary to the provisions of said act.

The information alleged that defendant sold fermented cider, contrary to the provisions of the resolution adopted by the board of supervisors pursuant to such law. *Held*, that it sufficiently alleged that the law had been made and was operative in the county.

Section seventeen of the act makes a certified transcript of the record of the preamble and resolution of the board of supervisors evidence that the provisions of the act are in full force in the county. *Held*, that it is unnecessary, on a prosecution under the act to prove a promulgation of the adoption of such preamble and resolution.

The statute prohibits the sale of fermented cider. *Held*, that the stage of fermentation or its intoxicating qualities are immaterial.

The respondent had been formerly convicted for the same offense, and to prove this the judgment was introduced which showed that upon a plea of guilty, respondent had been ordered to pay a fine of one hundred dollars and costs. *Held*, that a confession of guilt is a conviction, within the meaning of the statute, which imposes a heavier penalty on a conviction for a second offense; and such penalty is properly imposed for the second offense though the judgment and sentence for the first offense may have been void for noncompliance with the statute.

Reported in 55 N. W. Rep., 461, 95 Mich., 541.

The People *vs.* May Wheeler. Error to Hillsdale. Violation of liquor law. Reversed and new trial ordered.

The respondent was convicted of keeping open a saloon on Sunday.

It was contended that the complaint charged no offense.

Howell's Statutes, section 2283*e*, requires saloons and other places, except drug stores, where intoxicating liquors are sold, to be closed on the first day of the week, commonly called "Sunday." *Held*, that a complaint for violation thereof is sufficient which charges that defendant was proprietor of a place where intoxicating liquors were sold, said place not being a drug store, and that on a stated day, which was the first day of the week, commonly called "Sunday," she kept her said place open, and did not keep it closed as required by law.

Exception was taken to the refusal of the trial judge to allow a peremptory challenge to certain jurors on the ground of bias.

One of the jurors on his *voir dire* testified that he had always been "down on liquor selling;" that, when sitting as a juror in a case where a liquor seller was interested as defendant or a witness, he had a prejudice against such person, and that, in the case of respondent, he could not say that such prejudice would be entirely removed. To the court he said that he would be prejudiced against a liquor dealer by reason of his business; but he was prompted by the prosecuting attorney, who stated that it was his understanding that the juror was prejudiced, not against the person, but against the business. *Held*, that a peremptory challenge to the juror should have been allowed.

Reported in 55 N. W. Rep., 371.

In the matter of Edward Reinheimer.

Petition by Edward Reinheimer for *habeas corpus*. Writ refused.

Howell's Statutes, section 8594, provides that "no person who has been discharged, by the order of any court or officer, upon a *habeas corpus* or *certiorari* issued pursuant to the provisions of this chapter, shall be again imprisoned, restrained, or kept in custody for the same cause; but it shall not be deemed the same cause (1) if he shall have been discharged from a commitment on a criminal charge, and be afterwards committed for the same offense by the legal order or process of the court wherein he shall be bound by recognizance to appear, or in which he shall be indicted or convicted for the same offense."

Held, that one committed upon a failure to comply with an order to give security to keep the peace, discharged upon *habeas corpus* for a defect in the commitment, and subsequently arrested and imprisoned upon a second commitment, in due form, issued upon said order, is lawfully imprisoned, and will not be discharged upon *habeas corpus*.

Reported in 55 N. W. Rep., 460.

Criminal cases pending in the Supreme Court:

The People *vs.* Albert E. Mason.
The People *vs.* Severne Knudson.
The People *vs.* Joseph Sweeney.
The People *vs.* Robert Smith.
The People *vs.* Frederick Brooks.
The People *vs.* Charles Reed, *et al.*
The People *vs.* William Palmer.
The People *vs.* Major Evans.
The People *vs.* George A. Blakely.
The People *vs.* Frank Parish.
The People *vs.* Charles E. Keefer.
The People *vs.* Olaf Johnson.
The People *vs.* Frank Kabat.
The People *vs.* Margaret C. Cook.
The People *vs.* John Abbott.
The People *vs.* Latin Skutt.
The People *vs.* Edward Troy.
The People *vs.* Robert J. Hatton, *et al.*
The People *vs.* William Curley.
The People *vs.* James Pitton.
The People *vs.* Jesse Carter.
The People *vs.* Albert Taylor.
The People *vs.* John B. Hughes.
The People *vs.* Julius Dupree.
The People *vs.* Ulyses Grant Keefer.
The People *vs.* John Sykes.
The People *vs.* Christopher O'Brien.
The People *vs.* Joseph Quinlan.
The People *vs.* Abijah Eaton.
The People *vs.* William H. Wade.
The People *vs.* James Pitton.

The People *vs.* Lewis Newton.
The People *vs.* Charles H. Shelters.
The People *vs.* John Curtis.
The People *vs.* Martinus B. Kimm.
The People *vs.* Dirk Kimm.
The People *vs.* Thomas Hannifan.

SCHEDULE B.

Albert Molitor was a German by birth, and a soldier in the Union army in the late civil war, and after his discharge from service was employed by the government, he being an engineer, in connection with the lake surveys.

While engaged in this business on Lake Huron, he first came to the point of land now known as Presque Isle county, and being so well pleased with the location of the land, the heavy timber, the rich soil and fine climate, he determined to establish there a German community. Hence, in 1869, he commenced a settlement which is now known as Rogers City, in Presque Isle county, the village being named after one Rogers, a partner of Albert Molitor.

In 1871 the Legislature organized Presque Isle county, with two townships. After the organization of this county, the supervisors, it is alleged attempted to organize a third township so that they could have a "board of supervisors," and between the year 1871 and the year 1875, a large indebtedness was contracted for the erection of court houses the building of roads and other improvements.

In 1875 the Legislature reorganized the county of Presque Isle with five townships. After the reorganization of the county Albert Molitor was elected supervisor of the township of Rogers, and at once a trouble arose between the several townships concerning the division of the county indebtedness. The townships apparently most aggrieved by the attempts at adjustment were the townships of Belknap and Moltke.

A number of meetings of the board of supervisors were held looking to the adjustment of the accounts. Between the years 1871 and 1875 quite a strife had also arisen between the settlement known as Crawford's Quarry and Rogers City, Crawford's Quarry being situated on the lake about two miles from the settlement known as Rogers City, and in these several disturbances quite a per cent of the residents of the township of Belknap and the township of Moltke appear to have taken part or sided with the inhabitants of Crawford's Quarry.

In 1875 the principal men in business at Rogers City were Albert Molitor, who at that time was running a store, saw mill and lumbering camps, and one Herman Hefft, who was engaged in the mercantile business and was the keeper of a saloon.

On the night of the 23d day of August, 1875, while Albert Molitor was engaged in his store, himself and his clerk, one Edward Sullivan, were

shot by parties then unknown, through the window. Sullivan died some three days afterwards, and Albert Molitor died on the 18th of September, from the wounds then received. On the morning after the shooting a search was made by the sheriff and others, and it was thought that they discovered tracks around the building made by a boot that was of a peculiar shape, and one of the parties thought he identified the tracks as being similar to boots owned by one Andrew E. Banks, who was then the supervisor of the township of Moltke. On search being made Banks' boots were found with a shoemaker by the name of Bertram, they having been delivered to the shoemaker the morning after the shooting by Banks himself with the request to have them mended. The boots were delivered to the sheriff, and the sheriff claimed that they fitted the tracks. Bertram then notified Banks that he had delivered the boots to the sheriff, and Banks at once proceeded to the townships of Moltke and Belknap, and the following morning about nine o'clock appeared in the village with about eighty farmers at his back, demanding the boots, and also offering to prove that on the night on which the shooting was done he was at the house of one Krous, some six miles from Rogers City. The sheriff took refuge on a boat and got out in the lake where they could not get at him or get the boots, and an informal examination was held, and Banks proved by two witnesses that on the night Molitor was shot he was at the home of Krous, about six miles away.

It is claimed that the parties who came there were armed with all kinds of weapons, and it was shown conclusively that they came by the way of the brewery at Crawford's Quarry where they stopped and partook very freely of beer. The appearance of these armed men so excited the people of Rogers City that a despatch was sent to the Governor of the State and he at once sent Adjutant General Robinson to see what could be done to quell the riot. A few days afterwards, when Adjutant General Robinson arrived at Rogers City, the sheriffs and deputy sheriffs were sent out, and the farmers were requested to come in and meet the general, which they did; and after lecturing them upon their duties and receiving various promises of good behavior in the future all effort to ascertain who were the perpetrators of the murder seems to have ceased, and no action was taken from that time until the year 1891, at which time one William Repke went to the sheriff and prosecuting attorney of the county of Presque Isle, and made a statement to the effect that on the night of the shooting, himself and some twelve other persons met at a hill known as Reinke's hill, and that after having been sworn never to divulge the secret, proceeded to Rogers City, and some of the party shot Molitor and the clerk through the window. That they then returned to the hill, and were again sworn to not divulge the secret and departed to their homes.

Two of the parties who were named by Repke as having been engaged in the murder had been dead for some years prior to his confession or statement. Repke swore out a warrant for the arrest of the other parties implicated. As soon as the parties were arrested, five of the parties implicated confessed their part in the transaction, claiming that they were compelled to participate therein and that whatever they did was by duress. The other parties, who were claimed to be the leaders, denied all participation whatever in the transaction.

The first party tried was August Grossman. It was claimed, and the evidence tended to show, that August Grossman was one of the leaders;

and that he compelled a number of the parties to go or to promise to go, by threatening to shoot them in case they should not be present or should at any time divulge any knowledge that they might have of the transaction. The trial took place in Alpena, in December, 1892, and resulted in a verdict of guilty of murder in the first degree.

The next parties tried were August Foreman, Carl Vogler and Henry Jacobs. These parties were also found guilty of murder in the first degree.

The next trial was the trial of William Repke, the party who first made the statement, and a like result was reached in his case. He claimed, however, that his part in the transaction was by reason of duress; that he did not go of his own volition. Two of the witnesses swore that William Repke was the man who shot Sullivan, while all the others who were present at the transaction and who testified at the trial, claimed that Repke was there willingly, and was also one of the leaders.

The fourth trial was that of Stephen Reiger. He claimed, and the evidence tended to show that he was in Detroit and returned home on the Saturday prior to the murder on Monday; that on the afternoon of the 23d of August, 1875, William Repke came to his house, and told him that there was a bear which had carried off his calf and was hanging about to get his cow, and that he desired him to come over and meet some of the farmers that evening to assist in killing the bear. He claimed that on the night in question he went there and went to the mill where the parties met, believing that their object in going there was only for the purpose of killing the bear; that after he got there he was "held up" as it were by guns and compelled to go, that he did go, but took no part in the transaction, other than being present; that knowing that they would shoot him from what he saw there, he never afterwards divulged his knowledge until the time they were arrested as above stated.

The court charged the jury that if they believed that he was there against his will and involuntarily, and that he could not reasonably escape and avoid being present, they would be justified in finding a verdict of not guilty.

The jury evidently believed the story of Stephen Reiger, as they found a verdict of not guilty. The nature of the defense of the other parties who are now living is very similar to that of Stephen Reiger, and probably no others will be prosecuted.

The reason assigned by the leaders for the commission of this murder, at the time the crime was committed, as appears from the evidence of those interested and participating therein, was that Albert Molitor was running the county in debt.

Those who were leaders in the transaction used that as an argument to persuade the others to participate in the murder.

It was also claimed by those who took the principal part in the commission of the murder, when in conversation with those whom they persuaded or forced to participate, that under the laws of the United States if twelve men decided that Albert Molitor should die, it would be lawful to kill him; that twelve men made a jury in this country, and whatever they decided to do it was legal for them to do.

It does not appear, however, that very much reliance was placed upon this statement, as the parties who took part were very careful that no one should know of their connection with the matter.

SCHEDULE C.

This schedule contains a list of *mandamus* cases, *quo warranto*, and other proceedings commenced by the Attorney General in behalf of the State, or commenced by other parties, in which the State is directly interested.

Board of Supervisors of Houghton County *vs.* Robert R. Blacker, Secretary of State.

Petition by the board of supervisors of the county of Houghton for a *mandamus* to compel Robert R. Blacker, Secretary of State, to give notice of the election of two representatives from said county, and to disregard the apportionment of representatives made by Public Acts of 1891, No. 109. Writ granted directing the Secretary of State to give notice of election of members of the State Legislature under the apportionment made by Public Acts of 1881, No. 255.

The Legislature, by Act No. 109, Public Acts of 1891, apportioned anew the representatives in the Legislature among the several counties and districts of this State. The number of representatives was fixed by the first section of the act at 100, in accordance with section three article four, of the constitution, agreeably to a ratio of one representative to every 20,938 persons, including civilized persons of Indian descent, not members of any tribe, in each organized county, and one representative to each county having a fraction more than a moiety of said ratio, and not included therein, until 100 representatives were assigned. Under the United States census of 1890 it appeared that Houghton county had a population of 35,389, or a ratio and a fraction more than a moiety. Under the above apportionment act, however, that county was divided, and the townships of Adams, Chassell, Duncan, Franklin, Hancock, Laird, Portage, Quincy, Schoolcraft, and Torch Lake made to constitute one representative district, while the townships of Calumet and Osceola, of Houghton county, and the whole of the counties of Keweenaw and Isle Royal, were constituted one representative district; that is, two townships of Houghton county were cut off and put into a district with Keweenaw and Isle Royal counties.

It was claimed that the constitution was violated by this act in two particulars; (1) In dividing the county by putting two of the townships into a representative district outside of it; (2) In refusing to give to the county two representatives, it having a ratio and a fraction over a moiety.

Article four, section three of the constitution provides that representa-

tives in the State legislature "shall be chosen * * * by single districts;" that "each county hereafter organized, with such territory as may be attached thereto, shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation," and that "in every county entitled to more than one representative the board of supervisors shall * * * divide the same into representative districts equal to the number of representatives to which such county is entitled by law." Section 22 of the schedule of the constitution provides that "every county * * * entitled to a representative in the Legislature at the time of the adoption of this constitution shall continue so entitled," and that "each county having a ratio and a portion over equal to a moiety of said ratio shall be entitled to two representatives, and so on above that number." *Held*, (1) That it was the evident intention of these provisions that counties should not be divided unless entitled to two or more members, when the division should be made by the board of supervisors, and that the act referred to dividing Houghton county, and adding part of it to other counties, to form a representative district, was unconstitutional.

(2) That territory may be contiguous, within the meaning of article four, section three, declaring that "each representative district shall consist of convenient and contiguous territory," though it be separated by wide stretches of deep and navigable waters.

(3) That every county cannot be given its proper number of representatives without violating article four, section three of the constitution, limiting the total number of representatives to 100; but the Legislature must exercise discretion in depriving a county of part of its proper representation, and Public Acts of 1891, No. 109, giving to a county with less population than another a greater representation, is not a constitutional exercise of such discretion, and is void.

(4) For the same reason the apportionment law of 1885 was also held unconstitutional.

Reported in 52 N. W. Rep., page 951, 92 Mich., 638.

Theron F. Giddings, Relator *vs.* Robert R. Blacker, Secretary of State.

Mandamus on the relation of Theron F. Giddings against Robert R. Blacker, Secretary of State, relative to the issue of notice of the election of senators. Writ granted.

The constitution of Michigan contains the following provisions, found in article 4: "Section 1. The legislative power is vested in the Senate and House of Representatives. Sec. 2. The Senate shall consist of thirty-two members. Senators shall be elected for two years, and by single districts. Such districts shall be numbered from one to thirty-two, inclusive, each of which shall choose one senator. No county shall be divided in the formation of senate districts, except such county shall be equitably entitled to two or more senators." "Sec. 4. The Legislature shall provide by law for an enumeration of the inhabitants in the year 1854 and every ten years thereafter, and, at the first session after each enumeration so made, and also at the first session after each enumeration by the authority of the United States, the Legislature shall rearrange the senate districts according to the number of white inhabitants and civilized persons of Indian descent not members of any tribe." Acting under these constitutional provisions the Legislature passed the sen-

atorial apportionment act, No. 175, Public Acts of 1891. By the census of 1890 the population was 2,093,889. The ratio of each district would therefore be 65,434. Eight of the districts under this act contained populations as follows: Seventh, 91,420; tenth, 82,697; fourteenth, 88,678; eighteenth, 86,129; twentieth, 84,694; twenty-fifth, 82,556; twenty-seventh, 97,330; thirty-first, 82,213. These were the eight largest districts. Eight other districts contained populations as follows: Twelfth, 41,245; eleventh, 42,-110; sixteenth, 46,626; twenty-second, 42,546; twenty-third, 39,727; twenty-eighth, 43,701; twenty-ninth, 40,033; thirtieth, 53,068. Under this apportionment eight senators would represent constituencies numbering in all 695,717, while eight other senators would represent constituencies numbering in all only 349,056. The county of Saginaw was given two senators, although it contained a population of only 82,273. The twenty-seventh district was composed of nine counties, with a population of 97,-330, while the twenty-ninth with eight counties, five of which adjoin a like number of counties of the twenty-seventh, contained a population of only 40,033.

The relator was a citizen and an elector in the seventh district, composed of the counties of Kalamazoo, St. Joseph and Branch, with a population of 91,420, and prayed for the writ of *mandamus* to restrain the respondent, the Secretary of State, from giving notice of the election of senators, under the act of 1891, and to compel him to give notice under the apportionment act of 1885. The petition also contained a prayer for general relief. The basis upon which relief was sought was that the power delegated by the above provisions of the constitution to rearrange the senatorial districts is limited; that the limitation was wholly disregarded by the act in question, and the act was therefore unconstitutional and void.

The court held that under the power given it by the constitution, article 6, section 3, to issue writs of *mandamus*, and hear and determine the same, it had jurisdiction of a suit to restrain the Secretary of State from giving notice of the election of senators under the said senatorial apportionment act, and to compel him to give notice under a former act, on the ground that the last act was in violation of the constitution, article 4, sections 2 and 4, above quoted. That the discretion of the Legislature in this regard was not absolute.

That such a proceeding may be had on the relation of a private citizen, it being apparent by the appearance of the Attorney General for respondent that he would not have instituted the proceedings if applied to by the relator.

That under the constitution, article 4, section 2, providing that the State Senate shall consist of 32 members, one from each district, no county to be divided in the formation of districts except it be equitably entitled to two or more senators, and section four, providing for a periodical enumeration, and a rearrangement by the Legislature at its first session thereafter of the senatorial districts according to the number of inhabitants, an act dividing a county of 82,000 into two senatorial districts, uniting nine counties, with a population of 97,000, into a single district, and eight other counties contiguous thereto, with a population of only 40,000, into another district, is clearly unconstitutional, the population of the State entitling each 65,000 inhabitants to a senator.

The court holding that not only the last senatorial apportionment act, but the one prior being unconstitutional for the same reason, the Secretary of State was directed to issue the notice of election of senators according

to the next prior act, the validity of which was not brought in controversy, provided a special session of the Legislature was not called to make a new apportionment.

Reported in 52 N. W. Rep., page 944, 93 Mich., 1.

Edwin T. Bennett *vs.* George W. Stone, Auditor General. *Mandamus.* Settled by parties.

This was a petition for a *mandamus* to compel the Auditor General to audit the account of the relator for printing and publishing the delinquent tax lists for 1891. The facts in this case were substantially the same as those in Browne *vs.* Auditor General, referred to on page 48, Attorney General's Report for 1892.

The case was settled by paying forty cents per description, less twenty-nine dollars for erroneous descriptions and work left undone.

James D. Turnbull *vs.* J. Wight Giddings, President of the Senate, and Dennis E. Alward, Secretary of the Senate.

and

Thomas E. Barkworth, relator, *vs.* William A. Tateum, Speaker of the House of Representatives, and Lewis M. Miller, Clerk of the House of Representatives.

These were two applications for writs of *mandamus*, one by Senator Turnbull, to compel the president and secretary of the Senate to insert a certain protest in the journal; the other by Representative Barkworth, to compel the speaker and clerk of the House of Representatives to do the same. Both applications denied.

The relator in the first case was a senator from the twenty-ninth senatorial district of the State of Michigan. He charged that Milton F. Jordan, of Middleville, Barry county, Michigan, was duly elected and returned as a senator from the fifteenth senatorial district of the State of Michigan, and that the name of said Jordan was certified to the secretary of the senate by the Secretary of State as provided by law.

That Samuel M. Wilkins presented a protest against the seating of Senator Jordan. That a special committee was appointed on contest; that afterwards said Milton F. Jordan, senator from the fifteenth senatorial district, filed an answer, which answer was referred to the committee on contest; that a majority and minority report were presented by the committee on contest; that upon the filing of the reports Senator Fox offered a resolution:

"*Resolved*, That Milton F. Jordan was not elected as senator of the State legislature for the fifteenth senatorial district of the State of Michigan, and that he is not entitled to a seat in this body."

The relator alleged that he voted against the resolution of Senator Fox and also against the resolution declaring Samuel M. Wilkins elected as senator, and that on the 15th day of February, 1893, while the Senate was in session, he presented a protest, signed by himself, against the action of the Senate in declaring Milton F. Jordan not elected as senator from the fifteenth senatorial district and in declaring Samuel M. Wilkins elected, in the following language: "Mr. Turnbull asked leave to present a protest signed by himself against the action of the Senate yesterday in declaring

Milton F. Jordan not elected as senator from the fifteenth senatorial district, and in declaring Samuel M. Wilkins elected as senator from the said district, which protest Mr. Turnbull asked to have spread upon the journal.

The president held that under the constitution any senator may dissent from, and protest against any action of the Senate and have the reason of his dissent entered upon the journal, but that the protest offered by Mr. Turnbull was out of order as reflecting upon the honor of the Senate."

"Mr. Morrow appealed from the decision of the chair on the ground that the ruling was contrary to the constitutional guaranty, the question being, 'shall the decision of the chair stand as the judgment of the Senate * * * *.'"

The decision of the chair was then ordered to stand as the judgment of the Senate, a majority of the senators present voting therefor. The relator voted against sustaining the chair. Afterwards, on the 16th day of February, 1893, the Senate being in session the relator presented a resolution asking that said protest be presented to the president or a special committee of three, of whom its president shall be chairman, to report to the Senate the language contained in said protest which is improper or unparliamentary or reflects on the honor of the Senate. Thereupon a motion was made to lay the resolution on the table. The yeas and nays were taken upon said motion. A majority of the members voted in favor of said motion to lay on the table by yeas and nays, and thereupon afterwards, and after the yeas and nays had been taken, a motion was made to expunge from the records all matters appertaining to the resolution, on which motion the yeas and nays were demanded and the motion was carried by a majority of the senators present and voting thereon, and thereupon all reference of every kind in the journal of the Senate on the 16th day of February, 1893, was expunged from the record and nothing appears on said record to show that any resolution was offered by the relator or any action had thereon, although more than one-fifth of the members of the said Senate voted against expunging the same.

The relator claimed that by virtue of article 4, section 10 of the constitution of this State, the said Senate had no legal right to expunge the yeas and nays from the journal, and that under the same article and section the relator had a constitutional right to dissent from and protest against the unwarranted, unjust proceedings so had and taken by the Senate in removing Milton F. Jordan and declaring Samuel M. Wilkins elected senator from the fifteenth senatorial district, and to have the reasons of his dissent entered upon the journal.

The relator also alleged that Dennis E. Alward, one of the defendants, was secretary of the Senate and J. Wight Giddings was president of the senate, and that it was the duty of the secretary of the Senate to record all protests presented by any member of the Senate against any proceedings or actions taken by the Senate and against which said member desires to protest, and that the said J. Wight Giddings had no authority to deprive the relator of his constitutional rights in that regard.

The relator alleged that he had used all lawful means in his power to secure his rights in the premises; that the secretary of the Senate had refused and neglected to print the protest in the journal, although said protest was duly delivered to the secretary at the time it was presented and had remained in his possession most of the time since, and alleged that the action of the secretary was unlawful, by reason of the unwarranted

and unlawful interference of the said J. Wight Giddings, and that the relator was without remedy in the premises unless the court should interfere by writ of *mandamus* commanding said J. Wight Giddings and said Dennis E. Alward to cause to be recorded in due form the protest and also the resolution with the yeas and nays thereon.

The relator in the second case was a representative from the first representative district of the county of Jackson.

He charged that on the 9th day of February, 1893, while the House of Representatives of the State of Michigan was in session, Representative W. W. Ferguson offered the following resolution:

"*Resolved*, That the House of Representatives of the State of Michigan contemplates with horror the manifest disposition on the part of the controlling element of the population of the southern states to condemn, unheard, colored people accused of crimes and misdemeanors, and to visit upon those poor defenseless people whom the constitution of our country guarantees the rights belonging to all our citizens, punishments cruel and barbarous. This House calls upon the authorities at Washington to exercise the power of the nation to prevent wholesale lynchings, and other crimes of like character."

Representative Wachtel moved that the resolution be referred to the committee on federal relations, which motion did not prevail. The question being on the adoption of the resolution, the relator demanded the yeas and nays. The demand was seconded, and pending the roll call, the relator moved to amend the resolution by striking out the word "southern" and inserting in lieu thereof the word "United."

The relator set forth in the petition that at that time he honestly and conscientiously believed that similar violations of law to those referred to in the resolution had been committed in the State of Michigan and other northern states; and that the resolution was an inexcusable and entirely unwarranted discrimination against a section of the country as orderly and law-abiding as any other, and that such action on the part of the Legislature was an exhibition of sectional malignity unworthy of the people of a great State, and therefore he offered the amendment above mentioned.

The amendment was lost, and the original motion was adopted by a vote of sixty-three yeas to twenty-six nays. The relator voted against the motion, and thereupon directly after the calling of the roll, presented a protest in the following language: "I desire to protest against the passage of this resolution as an inexcusable and entirely unwarranted discrimination against a section of the country as orderly and law-abiding as any other, and as an exhibition of sectional malignity unworthy of the people of a great State. T. E. Barkworth."

The speaker of the House ruled the protest out of order, "as a reflection on the House."

The relator appealed from the decision of the chair, and the ruling of the chair was sustained by a strict party vote, fifty-seven yeas to twenty-eight nays. Afterwards on the 3d day of March, 1893, the relator again offered his protest to the passage of the resolution so offered by Representative W. W. Ferguson, which is as follows: "I desire to protest against the passage of the resolution offered by Mr. W. W. Ferguson, on Thursday, February 9, 1893, as appears by the journal on page 233, reading as follows:

"*Resolved*, That the House of Representatives of the State of Michigan contemplates with horror the manifest disposition on the part of the

controlling element of the population of the southern states to condemn, unheard, colored people accused of crimes and misdemeanors, and to visit upon those poor defenseless people whom the constitution of our country guarantees the rights belonging to all our citizens, punishments cruel and barbarous. This House calls upon the authorities at Washington to exercise the power of the nation to prevent wholesale lynchings, and other crimes of like character;" as an inexcusable and entirely unwarranted discrimination against a section of the country as orderly and law-abiding as any other, and as an exhibition of sectional malignity unworthy of the people of a great State. T. E. Barkworth."

The protest was ruled out of order by the speaker "as couched in disrespectful and unparliamentary language." At once the relator presented the same to the clerk, Lewis M. Miller, and requested that it be entered upon the journal, and the clerk indorsed thereon the following: "Presented by T. E. Barkworth, March 3, 1893, and ruled out of order and not to be received, as couched in disrespectful and unparliamentary language.

"LEWIS M. MILLER,"
"Clerk of the House."

The following is the brief presented by the Attorney General on behalf of the relators:

The protest of Mr. Turnbull was not "out of order as reflecting on the honor of the Senate," and the ruling of the president of the Senate was erroneous.

Article 4, section 10 of the constitution provides: "Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public and have the reason of his dissent entered on the journal." To the right granted by this clause there is no exception.

Webster's dictionary defines a protest as, "a solemn declaration expressive of opposition."

Black's law dictionary defines a protest as, "a formal declaration made by a person interested or concerned in some act about to be done or already performed, and in relation thereto, whereby he expresses his dissent or disapproval or affirms the act to be done against his will or conviction." He also further defines the word as, "a formal declaration made by a minority (or by certain individuals in a legislative body) that they dissent from some act or resolution of the body, usually adding the grounds of their dissent."

The president of the Senate ruled that the protest was "out of order as reflecting on the honor of the Senate." It will be understood that no other objection is made to the protest, hence the only questions presented are,

First, Does it "reflect on the honor of the Senate?"

Second, If it does "reflect on the honor of the Senate," is that a legal reason why it should not be spread upon the journal?

There is one thing that conclusively appears from the journal, and that is that it was presented and must have been examined by the president as he ruled upon its contents, and certainly he could not have known of its contents until it was presented to the Senate, and reference to the protest shows,

First, That Senator Turnbull claims that the reason of his protest was

"because from the admitted and undisputed facts he (referring to Senator Jordan) is as justly entitled to his seat as any other member of this honorable body."

Senator Turnbull then recites the facts, which he claims are admitted and which are the basis of the reason for his protest. I here submit that every fact submitted by Senator Turnbull is fully substantiated by the journal itself; and right in this connection permit me to say that from a legal standpoint no language can ever be uttered in the Senate which will reflect as strongly upon the honor of that Senate as did the unlawful and revolutionary action of the body itself in unseating Senator Jordan.

After Senator Turnbull referred to the facts and the law, in which he quoted from the opinion of this honorable court in the Lindstrom case used on the contest of Wheeler vs. Mugford, printed in the journal on page 122, and which so far as the law is concerned and all facts relating thereto, effectually disposed of the claim of the contestant in the Wilkins-Jordan contest, and without using one single word in any way reflecting on any member of the Senate he closes the formal part of his protest as follows: "In the name of the Democratic, Peoples and Prohibition parties, as well as in the name of the honest voters of the Republican party, we protest against the revolutionary action of this body in unseating Milton F. Jordan, and we call the attention of this honorable body to the fact that in all the contests recorded in any legislative body no case can be found where the same body has changed its own rulings within thirty days, and also overruled the decision of its own Supreme Court within the same time; that a decent respect for our own standing as a consistent, fair minded and honest body should deter us from sustaining one senator in his seat and unseating another on substantially the same state of facts; also that the respect, which, as good citizens, we give to the court of last resort of this State should restrain us from overruling its decisions."

The only word in the protest which could in any way affect the "honor of the Senate" is the word "revolutionary," and that is fully explained by what follows. Senator Turnbull claimed that the Senate had ruled one way in one case, and it had now changed or revolutionized its action and ruled another way in another case. That was Mr. Turnbull's conclusion from the facts as he saw them, and if the facts reflected upon the honor of the Senate Mr. Turnbull certainly had a right to state the facts, and if the facts did not reflect upon the honor of the Senate no injustice whatever was done to the senators. But I submit that the language used is as mild and reasonable as any gentleman could use in a legislative body. It is a frank statement of the opinion of Mr. Turnbull and the facts upon which it is based. I again call attention to the fact that no objection was made by reason of the length or by reason of the form of the protest, but simply that it reflected upon the honor of the Senate; hence I say that there is no reason in the excuse; but

Second, The whole thing so far as "reflection upon the honor of the Senate" is concerned is simply nonsense. No man can protest or object to what another does without dissenting from it. If he dissents because he does not concur in the judgment of the other party he reflects upon such judgment. If he objects because he does not think the other party has acted honestly, he must necessarily reflect upon the honesty of the party. If he protests because he does not believe in the wisdom of a measure he must necessarily reflect upon the wisdom of those who supported the measure. If he protests because he does not believe that the

action taken was lawful he must necessarily reflect upon the knowledge possessed by those who are opposed to him.

The right given in the constitution is not limited to the use of language that may reflect upon the honor of the Senate. The very reason for giving the right is based upon the fact that the Senate may do dishonorable things, and that any member who dissents from such dishonorable action shall have a right to protest against it and state the reasons for his protest and have them entered on the journal.

We are living under a written constitution. The right is guaranteed to the member by that constitution that his protest may be recorded, and be an evidence of his standing and his position on any question for all time to come, and the ruling of legislative bodies, where the right is not granted by constitution, is no basis whatever upon which to found any judgment in a case like the one at bar.

II.

The next question to which I desire to call the attention of this court is that concerning the resolution offered by Mr. Turnbull. The charging part of the petition in that regard is as follows: "And afterwards on the 16th day of February, 1893, the Senate being in session, your petitioner presented a resolution asking that said protest be presented to the president or a special committee of three of whom its president shall be chairman, to report to the Senate the language contained in said protest which is improper, unparliamentary or reflects on the honor of the Senate, a copy of which resolution and the preamble thereto attached is attached hereto and marked "exhibit C" and made a part hereof, and thereupon a motion was made to lay the resolution on the table. The yeas and nays were taken upon said motion and a majority of the members voted in favor of said motion to lay on the table by yeas and nays, and thereupon afterwards and after the yeas and nays had been taken a motion was made to expunge from the records all matters appertaining to the resolution of your petitioner, on which motion the yeas and nays were demanded, which motion was carried by a majority of the senators present and voting thereon, and all reference of every kind in the journal of the Senate, on the 16th day of February, 1893, was expunged from the record, and nothing appears on said record to show that any resolution was offered by your petitioner or any action had thereon, although more than one-fifth of the members of the said Senate voted against expunging the same."

The question raised by this allegation is simply this: Can this court require the said secretary of the Senate to restore to the record the yeas and nays and the resolution so expunged on the 16th day of February, A. D. 1893.

I am aware that the court has held that what appears upon the face of the journal cannot be contradicted by parole, and that matters never appearing on the journal cannot be supplied by parole, and I do not seek in this case to contradict what appears upon the face of the journal by parole, nor to add matters which have never appeared thereon.

The question raised has never been before this court, and it is unlike any question on which the court has ever been called upon to decide. As I have already said it is not proposed to contradict the journals by alleging that anything appearing upon the journal is false, neither is it pro-

posed to supply anything that has never appeared upon the face of the journal.

My position is this: The court is bound to take judicial notice of the journal, and they are bound to take judicial notice of any change that is made in the journal.

This court is in session today and it is called upon to act upon certain things that appear upon the legislative journal. It takes judicial notice of the contents of the journal. Supposing now that the Legislature in its session tomorrow should expunge from the record the very matters on which the court is called upon to act today and leaves the record as a blank. Will not the court take judicial notice of the fact that the journal has been changed? and if not, why not?

I have examined carefully the decisions of this court from the case of The People *vs.* Mahaney, 13 Mich., 481, to and including the case of Auditor General *vs.* The Supervisors of Menominee County, 89 Mich., 566, and I have not found any authoritative expression of the court which it appears to me in any manner opposes the proposition I now make.

The case of Mahaney *vs.* The People was on the construction of article four, section nine of the constitution, which expressly provides that the Legislature shall be the judge of the qualifications and election of its own members, and it was simply held that inasmuch as that power was given to the Legislature, the court could not review their decision. In that case Mr. Justice Cooley said: "Although the courts must take judicial notice of legislative action so far as it affects the validity of the statutes, they have no such power as respects the facts attending the election of the several members, and it remains to be seen whether we can notice those facts *even after they have been spread upon the legislative journals* and make them the basis of judgments, the retrospective effect of which would be to unseat members of a body long since adjourned, and to annul the action by declaring the votes of such members illegal and invalid. * * * * While the constitution has conferred the general judicial power of the State upon the courts and officers specified, there are certain powers of a judicial nature which, by the same instrument, are expressly conferred upon other parties or officers, and among them is the power to judge of the qualifications, elections and returns of the members of the Legislature."

The portion that I have above quoted is the substance of the entire decisions; but Mr. Justice Cooley, in the clause quoted, clearly shows that there are two classes of cases. He says that they must take judicial notice of legislative actions so far as they affected the validity of the statutes, but they have no such power as respects the facts attending the election of the several members, and he plainly says that the reason that they have not the power is that because, by the constitution, such power is specially delegated to the Legislature.

The contest in this case is under an entirely different section of the constitution, article four, section ten.

The command of that section is that each house shall keep a journal. The power to keep a journal is not the power to destroy a journal. The power to keep does not embrace the power to obliterate, to expunge. This same section also provides that the yeas and nays on any question shall be entered upon the journal at the request of one-fifth of the members. When the yeas and nays have been entered upon the journal at the request of one-fifth of the members, the journal is "kept." It becomes at that moment an absolute existing thing. The Legislature of the State has per-

formed every power that it has over it except, if it desires to publish it, it may publish it afterwards, but it cannot destroy nor mutilate it.

This court has repeatedly held "that courts are authorized to take judicial knowledge of legislative journals."

Attorney General *vs* Rice, 64 Mich., 392.
People *vs* Mahaney, 13 Mich., 481.

In fact, it is a well established principle of the law that the courts will take judicial notice of legislative journals, and to that end I cite Cooley's Constitutional Limitations, fifth edition, page 163, and cases cited under note 2.

Now the question arises, "What is meant by judicial notice?" It does not simply mean that they may examine all journals and see what is in the journals and then be bound by that. That is not *judicial* notice, that is *actual* notice. Judicial notice is defined in Black's law dictionary as: "The act by which a court, in conducting a trial, or framing a decision, will, of its own motion, and *without* the *production* of *evidence*, recognize the existence and truth of certain facts, having a bearing upon the controversy at bar, and which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety, e. g., the laws of the State, international law, historical events, the constitution and course of nature, main geographical features, etc."

The power to take judicial notice of geographical features, county boundaries, location of cities, is the power to judicially take notice of the the change of boundaries, the change of location.

One of two things are true: Either this court is wrong when it says that it can take judicial notice of the legislative journals of the State of Michigan, or it has the power to take judicial notice of the fact that the journals of one hour of the day were mutilated and destroyed the next hour of the day, otherwise it can only take notice of the fact that a journal which is a false, changed and mutilated journal is the true journal of the Senate, a proposition too absurd for any reasonable mind to give it credence. If the court can only take judicial notice of the contents of the journals, after they are presented to them and is bound by the journals themselves, then will it be bound to believe that a lie is the truth; but if, as this court has repeatedly held, it can take judicial notice of the contents of the journal it must of very necessity take notice of any change that is made in the journal. In the case of Brown *vs*. Piper, 91 U. S., at page 42, Mr. Justice Swayne giving the opinion of the court, which opinion was concurred in by the entire court, uses this language: "But there are many things of which judicial cognizance may be taken, 'To require proof of every fact, as that Calais is beyond the jurisdiction of the court, would be utterly and absolutely absurd.' Gresley's Ev. in Eq., 294. Facts of universal notoriety need not be proven. See Taylor's Evidence, section 4, note 2. * * * * Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1st Greenleaf on Evidence, 11; Gresley's Evidence, *supra*; and Taylor's Evidence, section 4, and *post*.

"In the Ohio L. & T. Company *vs*. Debolt, 16 How. 435, it was said to be 'A matter of public history, which this court cannot refuse to notice,

that almost every bill for the incorporation of companies of the classes named, is prepared and passed under the circumstances stated.' In Hoare *vs.* Silverlock, 12 Ad. & Ell., N. S., 624, it was held that where a libel charged that the friends of the plaintiff had 'realized the fable of the frozen snake,' the court would take notice that the knowledge of that fable existed generally in society."

In this case the fact that this journal has been changed is a notorious fact, and it is known by every intelligent man and woman within the jurisdiction of this court, and if we are to apply the rule just quoted from the case of Brown *vs.* Piper that "Courts will take notice of whatever is generally known within the limits of their jurisdiction," then must this court take judicial notice of the fact that the Senate has obliterated and changed its journals.

The matter here contended for is of vital interest to the people of this State.

If it be held that this court cannot take judicial notice of the change in the journals, and is bound to believe that a journal that has been since its first making changed, is in fact the true journal of the Senate or House, then the Legislature can expunge from its record every vote and every proceeding that has taken place during this term of the Legislature, and laws which have been enacted, and under which the State Treasurer has paid out the money of the State, may be in this manner annulled and held for naught, and the Treasurer today may be legally responsible and be holden under his bond to pay to the State of Michigan money which he had legally expended by order of the laws of the State but yesterday.

Has not the court been right when it has repeatedly held that it could take judicial notice of the journals?

In such a time as this, where the advantages of newspapers and the various improvements in acquiring knowledge by the people, the change suggested by obliterating the journals of the House could not take place in the State of Michigan without being universally known by all the people, or the great majority of the people within the jurisdiction of this court, and under the ruling laid down in Brown *vs.* Piper that courts will take notice of whatever is generally known within the limit of their jurisdiction, this court would be bound to take notice of the change in the journals made by the Senate.

There is no case that can be found where any court or legislative assembly has ever contended that under a constitution like ours, all reference to the expunging resolution should also be taken from the journal. In the memorable case in 1837, concerning the resolution to expunge from the journal the resolution of the Senate of the United States of March 28, 1834, in relation to President Jackson and the removal of the deposits, it was not there contended for a moment by those who supported the proceedings in that case, that you could expunge from the record the resolution by which the resolution itself was expunged, and it was there claimed and argued by those who supported the expunging resolution that such a course as that would be unconstitutional. In that case the party produced the journal of the Senate, opened it at the page which contained the resolution to be expunged, and in the presence of such of the members of the Senate as remained (many having retired), proceeded to draw black lines entirely around the resolution and endorse across the lines these words; "Expunged by order of the Senate this 16th day of January, 1837.' (See Abridgments of the Debates of Congress, Vol. 13, page 156.)

The action on the part of the Senate was February 16. On the third of March the House did precisely the same thing, and this is evidenced by their own journals of March 4 (without any judicial knowledge); but not having the required quorum they were unable to obliterate from their journals all vestige of the proceedings.

I cannot too earnestly impress upon this court the necessity of taking judicial knowledge of this matter, and enforcing upon the Legislature of this State the necessity of obeying the constitution, and in this connection I insist that the Legislature of this State has no more right to destroy the journals or to expunge matters therefrom than has any other branch of the government a right to destroy the same journals.

If the court shall adopt the position here contended for that in a case like this where personal privileges and personal rights are at stake, they will take judicial knowledge of a change in the journals, it will effectually prevent either branch from expunging from the record any matter covered by the constitution after it has become a part of such journal.

This court should either hold that the journals are conclusive evidence and not take judicial notice of the journals, or else it should take judicial notice of the change of the journals, otherwise we have the absurd position that this court takes judicial notice that a false journal is a true journal of the Senate.

All of the decisions of this court must be read in the light of the facts which were before the court at the time they made the decision, and it will be observed that no case has ever brought before this court this question, that the legislative body has attempted to annul and change its own records.

In this connection I further desire to urge upon the court the fact that as soon as this resolution was presented and delivered to the secretary of the Senate, it became and was one of the public documents legally and properly in the hands of said secretary, and the court must take judicial notice of such fact, and the manner of doing such business, and this court has a right, if there is any question about the fact, to compel the clerk to bring forward this paper, which, by virtue of that resolution became a part of that journal, and the court can examine it and by proper order enforce the rights guaranteed the member by the constitution.

The right guaranteed by this clause of the constitution is a personal right in which not only the senator himself is interested, but his constituents and the people of this State are interested as well. The language of article four, section ten of the constitution, concerning the keeping of the journal and the entering of the yeas and nays on the journal at the request of one-fifth of the members, is in the same language as that used in the constitution of the United States, and I call the court's attention to the language used by Daniel Webster in the Senate of the United States in his protest against the expunging resolution of 1837, as being a fair statement of the rights of the member, the necessity of keeping the journal, and the right to have the yeas and nays entered upon the journal. (See Abridgment of the Debates of Congress, Vol. 13, pages 153, 154 and 155.)

III.

Article four section ten of the constitution of this State provides, "Each house shall keep a journal of its proceedings, and publish the same, except

such parts as may require secrecy. The yeas and nays of the members of either house, on any question shall be entered on the journal at the request of one-fifth of the members elected. Any member of either house may dissent from and protest against any act, proceeding or resolution which he may deem injurious to any person or the public, and have the reason of his dissent entered on the journal."

It will be observed that there is no exceptions fron the "keeping" all that transpires on the journal. There is an exception, however, so far as publishing, and that part which they may determine requires secrecy, need not be published.

There is no limitation whatever in the constitution in that portion of article 4, section 10, concerning the right of protest. The constitutional privilege gives to each member of the Senate and the House a right to "dissent from and protest against any act, proceeding or resolution which he deems injurious to any person or the public, and have the reason of his dissent entered on the journal" The only possible limitation in this clause is simply the decision of the member himself that he deems it injurious to either the public or an individual.

The kind of the proceeding, the nature of the resolution, of the act dissented from, is left entirely to the discretion of the member.

The representative or senator is not in the Legislature for his own benefit, but he is sent there for the benefit of the people of the State. He represents each person and all of the people. Hence the language, "He deems injurious to any person or the public."

JURISDICTION OF THE COURT.

It is said that by reason of other clauses in the constitution that the right secured under article 4, section 10, becomes inoperative, or that, in other words, while the constitution in form pretends to secure certain rights, yet it gives a right without a remedy. Not only this, but that the very constitution which names the right, effectually bars the remedy; and that by reason of other clauses in the constitution, the court has no jurisdiction to enforce the rights of the relator, and that by virtue of the constitution, which is our bill of rights, the right named "has become as sounding brass, or a tinkling cymbal."

We deny the assertion that this court is without jurisdiction, and deny that the constitution contains any clause, which in any manner deprives the relator of a remedy in this court to enforce this constitutional right. I contend that the constitution must be so construed that when taken altogether the several provisions will be harmonious with each other. And I contend that it does not lie in the power of any one man, or set of men, to deny to any person any right or privilege granted by the constitution, and then seek protection in a claim, that the very constitution which granted the privilege denies the aggrieved party any remedy to secure his rights.

What value is it to the people of this State that the constitution grants to them certain rights, if one man or set of men in the Legislature can treat such provisions as a blank? And what possible benefit is it to the people that the constitution grants to them certain rights, if the same constitution denies them the enforcement of such rights?

Article 18, section 10, of the constitution of this State, secures the right to the people "to petition the Legislature for redress of grievances."

Does that mean that such petitions shall not be heard, because the speaker of the House rules that they "reflect on the House, or contain unparliamentary language?"

The provision above quoted is not couched in as strong language as that contained in article 4, section 10, which guarantees to every member the right of protest.

Speaking of article 18, section 10, Judge Cooley, in the State Tax Land Cases, 54 Mich., 382, used this language:

"This section gives, and was intended to give, to the people the right to present their views to the Legislature on any subject which is of legislative cognizance. The members of this commission (speaking of the tax commission), had an undoubted right, from day to day and from hour to hour, to put their views on proposed changes in their bill before the Legislature in the form of petitions; and that body *could not have refused* to receive the petitions."

It can hardly be said that Judge Cooley meant by that language, that the Legislature *ought not* to have refused to accept the petitions, but that if they *did refuse* there was no power in the court to compel the Legislature to obey the plain mandates of the constitution.

The powers granted by the constitution are equal. One is not above the other, and every power granted must be so exercised that the party or department exercising it must not intrude or interfere with the powers granted to any other party or department; and the rights granted must be so used and enjoyed that in their use or enjoyment, other rights also granted by the same constitution shall not be lost; and if any person so exercises any power or right given him by the constitution that he deprives any person of the right granted him by the constitution then it is the particular province of this court to interfere and declare and enforce the rights of each. The court must interpret the constitution, and decide between persons claiming rights thereunder, and the right to interpret and decide necessarily includes the authority to enforce its decisions.

"In the interpretation of power" says Judge Story in his work on the constitution, "all the ordinary and appropriate means to execute it are to be deemed a part of the power itself, (section 430). If the end be legitimate and within the scope of the constitution, all the means which are appropriate and plainly demanded to that end, and which are not prohibited, may be constitutionally employed to carry it into effect, (section 434). Whenever general power to do anything is given, every particular power necessary for doing it is included, (section 434). It is in fact but the time honored maxim of the common law "*ubi jus, ibi remedium*" expanded in the proportion which belong to a canon of constitutional construction." The Legislature of the State of Michigan, nor the officers thereof, have no greater right than is vested in them by the constitution. The very constitution that grants to the Legislature certain powers, also gives to the Supreme Court of this State certain other powers, among which is the right to grant the writ of *mandamus*.

And it will be observed by a reading of section 3 of article 6 that there is no limit whatever placed upon the Supreme Court of this State in the granting of a writ of *mandamus*, but that right is granted in the broadest terms. The Supreme Court "shall have power to issue writs of error, *habeas corpus, mandamus, quo warranto, procedendo,* and other original and remedial writs, and to hear and determine the same."

And to make it plain that there should be no limit whatever upon the

issuing of the writ of *mandamus*, there is added to section 3, article 6, these words: "In all other cases it shall have *appellate jurisdiction only*."

Article 3, sections 1 and 2, divide the powers of the State into three departments; the legislative, executive and judicial, and provides: "No person belonging to one department shall exercise the powers properly belonging to another, except in cases expressly provided in this constitution."

It is not sought in this case to have the Supreme Court perform any duty that *devolves upon a member* of the Legislature, but we seek in this case to have the court *compel a member of the Legislature* or the clerk of one branch thereof to *perform himself the duties* that devolve upon him under the constitution.

The constitution of Nebraska contains a similar provision to those above quoted. The second article of their constitution provides that "The powers of the government are divided into three distinct departments—legislative, executive and judicial—and no person or collections of persons, being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter provided."

In discussing that very provision, under an application against the speaker of the House, to compel him to perform ministerial duties imposed by the constitution of that state, the Supreme Court of Nebraska uses this language:

"In these examples (speaking of examples in other cases), the court observed the literal sense of article 2 of the constitution, construing its meaning and intent to be that the respective duties incumbent upon and applicable to each separate department of the government is confined to it alone; but did not take the view, nor can it now, that where an officer of either the legislative or executive department, or the judicial, shall refuse to execute an imperative duty imposed by law upon the office of the incumbent, to the detriment and prejudice of a citizen, or of the public, that through this constitutional provision, while the courts have power of redress in cases of delinquent judicial officers, they are prohibited from considering any flagrant violation of the constitution or laws by officers of the other departments, lest the courts trench upon their prerogative. No such limited and sinister construction can be placed upon the second article without violating the spirit of the first, and violating many of its provisions. In the recent application for *mandamus* of Bates, relator, against the Governor and the State Board of Canvassers to certify the election of the relator to a judicial office, we held that in a proper case, to enforce the performance of a ministerial duty which the law specially enjoins as incident to an office, the writ would issue against officers of the executive department, and even against the supreme executive authority."

State *vs.* Elder, 47 N. W. R., 712.

The court granted the *mandamus* against the speaker in the above case.

The decisions in this State have uniformly been that any executive officer who neglected to perform any ministerial duty imposed upon him by law, or attempted to discharge any duty in violation of law, should be compelled by *mandamus* to perform the duty as the law directed. And under such holdings the Secretary of State has been compelled to give notices, the State Treasurer has been compelled to pay money, the Auditor Gen-

eral has been compelled to audit accounts, even the Board of State Auditors has been directed to audit accounts; and in fact the executive officers of the State, under all circumstances and any circumstances, have been compelled by this court to perform ministerial duties. Such is the law of this State.

There is just as much sense in holding that this court cannot interfere with the executive branch of the government, as there is in holding that it cannot interfere with the legislative branch of the government, and the doctrine is too well established for dispute, that under the laws of this State, this court has jurisdiction to compel any member of the executive branch of the government, except perhaps the Governor himself, to perform a ministerial duty.

The case of Sutherland *vs* Governor, while it denies an application for *mandamus* against the Governor, and that case simply follows the rule that *mandamus* will not be granted where discretion is given the officer, it might be said that the court attempted to go further and to overrule the well established doctrine that where a ministerial duty is imposed by law, that *mandamus* will lie to enforce it, but whatever the court might have said in that regard, has no binding force upon any court in the future. It is a mere dictum.

If *mandamus* will lie to the Secretary of State of the United States, to the Secretary of the Interior and to other executive officers, there can be but little sense in holding that it would not lie to the Governor, where he was required to perform simply a ministerial act.

In the case of Greenwood Cemetery Land Company *vs.* Routt, 28 Pacific Reporter, 1125, the Supreme Court of Colorado in a well reasoned case, fully sustained by authorities, granted a writ of *mandamus* to compel the Governor to sign patents to land; and it seems to me very doubtful if our court would not feel called upon to follow the doctrine laid down in Sutherland *vs.* Governor—that in no case would a writ of *mandamus* be granted against the Governor of the State.

The cases relied upon in the case of Sutherland *vs.* Governor are squarely opposed in principle to the other case held by our own court; but be that as it may, the speaker of the House cannot be said in any sense of the word to be the Legislature of the State nor the legislative department; in the House he constitutes only one hundredth part thereof.

The constitution of this State provides (article 4, section 1); "The legislative power is vested in a Senate and House of Representatives." In this case, we do not attempt to control the Senate and House of Representatives, but we do attempt to control the actions of one of the members by compelling him to do his duty and cease to interfere with the duties of others.

The speaker of the House of Representatives is a component part of the legislative department but he is not the legislative department, no matter what his opinion in that regard may be. Neither is the writ asked for to interfere with anything over which the law gives the speaker, as a representative, any discretion whatever.

What I have said concerning the writ of *mandamus* against the executive of the State only applies by analogy, as under the constitution of the State (article 5, section 1), the executive power is vested in a Governor and Lieutenant Governor. So, in the legislative department, the legislative power is vested in a Senate and House of Representatives.

The Secretary of State, the Auditor General, the State Treasurer, are component parts of the executive department, and all the decisions of this court relating to such officers have been to the effect that *mandamus* would lie to control their actions. Why not then, by analogy, should not the writ of *mandamus* lie to control the actions of the speaker of the House who is only a component part of the legislative department?

A great many well considered cases even hold that the writ would lie against the executive, and to that end I cite:

Martin, Governor *vs.* Ingham, 38 Kansas, 641.
Board of Liquidation *vs.* Macomb, 92 U. S., 541.
Tenn., etc., Rld. Co. *vs.* Moore, Governor, 36 Ala., 371.
Middleton *vs.* Low, Governor, 30 Cal., 596.
Harpending *vs.* Haight, Governor, 39 Id., 189.
Wright, Governor, *vs.* Nelson, 6 Ind., 496.
Baker, Governor, *vs.* Kirk, 33 Id., 517.
Gray, Governor, *vs.* The State, 72 Id., 567.
Magruder *vs.* Swann, Governor, 25 Md., 173.
Groom, Governor, *vs.* Gwinn, 43 Md., 572.
Chamberlain *vs.* Sibley, 4 Minn., 309.
Chumasero *vs.* Potts, 2 Mont., 242.
Wall *vs.* Blasdel, 4 Nev., 241.
Cotton *vs.* Ellis, 7 Jones (N. C. L.), 545.
State *vs.* Chase, 5 Ohio St., 528.

The doctrine that this court should not interfere, because perchance it might encroach upon the province of the legislative department, is answered by the fact that the journals of the House show the nature of the decision, and that the Legislature has refused and neglected to set aside the unlawful action of one of its members, by reason of which a member has been deprived of his constitutional rights, and the Legislature has assumed to render a judicial opinion. The reason of the right of interference is cleverly stated by the court in the case of Wallace vs. Hayne, 8 Rich. S. C., 375.

The court said: "Then it is alleged that this court has not jurisdiction over H. E. Hayne, one of the executive officers of the State, because, according to the limitations of the constitution, the powers of the government are vested in three distinct bodies, neither one of which can exercise any control over another. That may be conceded to the fullest extent, and yet what would become of the rights of the citizen vested in him, not only by the common law, but by the statutes, if there was no control over the executive department of the government? The treasurer is a part of the executive department, and yet more than one case may be found where this court has interposed to compel him to perform duties specially required of him by law. And so with the other officers. It is not an encroachment upon the duties of their particular department. The court does not undertake to say to them that 'We are to perform the duties assigned by law to you.' It does no more than say you must perform the specific duties assigned to you by law where you have not the privilege of exercising discretion, that is all. The *mandamus* could not compel the Governor to issue a pardon to a man; that would be an encroachment on his prerogative. But to say that the judicial department of the government, where a citizen avers that his right has been infringed upon by an executive officer, could not interfere, as for example, when the Legislature had appropriated a certain sum of money to be paid to him, and the treasurer refuses, is startling. Where would the judiciary be? Where would the other departments be? The judiciary would sink into mere insignifi-

cance. The other departments might increase in bulk and wield their powers to such an extent that the whole liberties of the people might be entirely destroyed."

Not only is it the right of this court to supervise the action of the speaker and House but it is always the duty of the court to protect citizens against the unlawful acts of legislative bodies. Speaking of the necessity of a supervision by the court over the action of legislative bodies, the court, in the case of Kilbourn *vs.* Thompson, 103 U. S., 192, said: "By reason, also, of the popular origin and the frequency with which the short term of office of its members requires the renewal of their authority at the hands of the people—the great source of all power in this country—encroachments by that body, on the domain of coördinate branches of the government would be received with less distrust than a similar exercise of unwarranted power by any other department of the government. It is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny."

The right to petition by the citizens and the right to remonstrate by a member of a legislative body, go hand in hand, and they are of the very essence of free government. The right of petition "derives its source," as said by Chief Justice Marshall in Gibbons *vs.* Ogden, 9 Wheat., 211, "from the laws whose authority is acknowledged by civilized man throughout the world." So with the right of protest. The constitution does not grant that right, but simply protects the legislator in the exercise of a right which was a part of the common law and fully established in the parliament of England years before we had a constitution, or existed as a free government.

Speaking of the right of petition, Judge Story, in his constitutional law, section 1894, says: "It is impossible that it could be practically denied until the spirit of liberty had wholly disappeared, and the people had become so servile and debased as to be unfit to exercise any of the privileges of freemen."

If the right of petition cannot be denied, has not this court a right to protect a person in the presentation of a petition before the Legislature? But if the court can protect a person in his right to present a petition to the Legislature then has the court the same constitutional right to protect a member of the Legislature in his constitutional right to present a protest. And if it has not the power in one case then it has not the power in the other.

In the case of State *vs.* Cruikshank, 92 U. S., 542, a party was indicted for denying to citizens the right to peacefully assemble themselves together and protest, and to say that a man may be indicted for denying to me a right to draft a protest, and that after I have the protest drafted, there is no power in the court to protect me in its presentation, is simply the height of absurdity.

Concerning this same right of petition and protest, Judge Cooley in his work on Const. Lim. at page 531 (6 Ed.) quotes approvingly the strong language used by the Court of Appeals of New York in overruling a decision of the lower court in holding that a petition was not a privileged communication. Judge Cooley says: "The prevailing opinion in the

court of review characterized this as 'a decision which violates the most sacred and unquestionable rights of a free citizen; rights necessarily connected with the relations of constituent and representative; the right of petitioning for a redress of grievances, and the right of remonstrating to the competent authority against the abuse of official functions.'"

The constitution of Michigan provides that the Legislature shall rearrange the senate districts and apportion the representatives among the counties. This was a duty placed on the Legislature. There was no doubt of the jurisdiction of the court to decide on the constitutionality of the doings of the Legislature in that regard. In that case certain discretion was vested in the Legislature; yet this court held in Giddings *vs.* Blacker, 52 N. W. R., 944, that the discretion of the Legislature was not absolute, and set aside the act of both houses after its approval by the Governor.

In the matter of keeping a journal, the requirements of the constitution are positive and absolute: "Each house shall keep a journal of its proceedings." Cannot this court enforce this duty? Suppose one house refuses to keep a journal; the other house has no control over it. The Governor cannot dissolve it and call another house under our constitution. What is to be done? If the other house complains by its officers to the court is the court without power in the premises? One house is not the Legislature. When it is duly organized and proceeding according to the constitution, it is one branch of the legislative department. When it is not proceeding according to the law and constitution, it is an unlawful assembly or a mob; and it is the peculiar province and the duty of the court to compel it to obey the constitution of the State in performing all ministerial duties.

This is not a case arising after the Legislature has gone home and where they have neglected to complete their records, and where the court is asked to correct them. The House is in session, and is proceeding contrary to the constitution; and if there is authority in the court to annul their action after they have gone home, there is power now to annul their action while they are in session. It is within the province of the court to restrain public bodies and officers from exceeding their jurisdiction, and even to reverse their rulings.

Attorney General *vs.* Board, 64 Mich., 607.
Coll *vs.* Board, 83 Mich., 367.
People *vs.* Supervisors, 3 Mich., 475.
People *vs.* Auditors, 13 Mich., 233.

In the case of Tennant *vs.* Crocker, 85 Mich., 329, the mayor claimed the right to break a tie and declared a certain vote carried. The question was raised that inasmuch as the question was passed upon, the writ would not issue for the purpose of correcting a decision, especially when the decision was made in the exercise of a discretion of the body or officer making the same. The court held that the decision of the mayor in the case did not involve the exercise of discretion, but was ministerial, as presiding officer of the council. So in this case the decision of the speaker is as void of discretion as it is of law. He was simply attempting to discharge a ministerial duty as speaker. The rule, however, established by the speaker, is on the record of the House and is a barrier in the way of the relator obtaining his constitutional rights, and it should be declared null and void by this court.

The privilege of protest, grounded as it is upon the right of petition and remonstrance cannot be said to be a right which can be taken away without due process of law. As was said by the Supreme Court of Maryland in the case of Groom *vs.* Gwinn, 43 Md., 628, in a similar case: "No court of justice is warranted in assuming that the constitution intended that the rights of parties can be taken away or decided by the form of trial, for which the law of the land has made no provision."

IV.

The *powers given* to the Legislature are *legislative, not judicial.* The *authority exercised* by the speaker and clerk is *judicial* and *unauthorized* by the constitution.

A very important question in this case is the determination of the nature of the power exercised by the speaker of the House.

We contend that the authority exercised by the speaker was judicial in its nature and that so far as his decision is concerned it amounts to the construction of the right of a member of the House to protest under the constitution; in other words it is a judicial decision concerning a constitutional right.

To the first protest "The speaker declared it to be out of order as reflecting on the House," in other words the speaker ruled and decided that Mr. Barkworth was not entitled under the constitution to present a protest in the language used. Such a decision is a judicial determination of a constitutional right.

When Mr. Barkworth presented the second protest, or the same protest a second time, it was ruled out of order, "as couched in disrespectful and unparliamentary language."

What does such a decision amount to, but a judicial determination that a member of the House has no constitutional right to present a protest, if the language, in the opinion of the speaker, is disrespectful or unparliamentary?

An examination of the difference between the different powers of the government will readily determine that the position here taken is correct, and that the decision made is not within the legislative province of the State.

The power given to the legislative department is not to construe the constitution and the laws, but to make laws.

Chief Justice Marshall, in Weyman *vs.* Southard, 10 Wheat., 46, uses this language: "The difference between the departments undoubtedly is that the Legislature makes, the executive executes, and the judiciary construes the law." Justice Cooley in his Constitutional Limitations (5th edition, p. 109), quotes approvingly the above language, and also says: "And it is said that that which distinguishes a judicial from a legislative act is that the one is the determination of what the existing law is in relation to some existing thing already done or happened, while the other is a pre-determination of what the laws shall be for the regulation of all future cases falling under its provisions. And in another case it is said 'The Legislative power extends only to the making of laws, and in its exercise it is limited and restrained by the paramount authority of the federal and State constitutions. (Newland *vs.* Marsh, 19 Ill. 383).' * * * * 'That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced. Such

power assimilates itself more closely to despotic rule than any other attribute of government.'"

The last part of the above quotation is approvingly quoted by Justice Cooley on page 110 in the work above cited; and is taken from Ervine's Appeal, 16 Pa. St., 256.

This court has also passed upon the same question relative to the judicial authority of the Legislature. In the case of Butler *vs.* Supervisors of Saginaw county, 26 Mich., 27, the court said: "Now it is well settled that the apportionment of legislative power to one department of the government, will not authorize it to exercise any portion of the judicial power, which is apportioned to another department. The apportionment is, of itself, an implied prohibition upon its exercise by the Legislature."

See also F. P. R. Co. *vs.* Woodhull, 25 Mich., p. 99, and cases cited under note 3.

Whenever the Legislature attempts to infringe on the judicial authority, it is not only the right, but it is the duty of the court to interfere and correct the unlawful decisions and interpretations of the legislative department.

Under article 6, section 1 of the constitution of this State, the judicial powers are vested in the courts, and the fact that the judicial power is by this section vested in the court necessarily deprives the Legislature of any judicial power, except perchance, that necessary power that is given them concerning the election of their own members and other powers expressly given by the constitution.

The constitution does not give the speaker of the House, nor the Legislature itself, any authority to decide concerning the constitutional rights of a member, under article four, section ten of the constitution; and the fact that the first ruling of the speaker was sustained by an unlawful determination of the House, does not give it any additional weight, or change the rule. It is the duty of the court to look into the determinations and judicial opinions of the Legislature and from such determinations to decide whether the authority exercised by the Legislature was judicial or legislative.

In this case, the ruling involved the rights of a member to a protest granted him by the constitution of the State, and the decision of the speaker amounts to a determination of that right, as well as a denial of the same. Can there be any doubt concerning the fact that the question passed upon by the speaker, was a judicial question, not a legislative one?

In the case of Kilbourn *vs.* Thompson, 103 U. S., 168, the Supreme Court of the United States fully and carefully considered the question as to whether or not the judicial department of the government was bound by the judicial determinations of the legislative departments of the government.

Thompson was the sergeant-at-arms of the House, and he arrested Kilbourn by order of the House, the House having determined after an examination of the matter that Kilbourn was in contempt of the House. The question was squarely presented to the Supreme Court by plea of justification, by which Thompson claimed that the House having determined that Kilbourn was in contempt, that such decision was binding upon the court, and that the court could not interfere with the legislative determination. The court first held that the House of Congress did not possess general powers to punish for contempt; and in disposing of this important matter, used this very significant language: See p. 197.

"If they (the House) are proceeding in a manner beyond their legitimate cognizance, we are of the opinion that this can be shown, and we cannot give our assent to the principle that, by the mere act of asserting a person to be guilty of contempt, they thereby establish their right to fine and imprison him, beyond the power of any court or any other tribunal whatever, to inquire into the grounds on which the order was made. This necessarily grows out of the nature of an authority which can only exist in a limited class of cases or under special circumstances; otherwise the limitation is unavailing and the power omnipotent. The tendency of modern decisions everywhere is to the doctrine that the jurisdiction of a court or other tribunal to render a judgment affecting individual rights is always open to inquiry, when the judgment is relied on in any other proceeding. * * * *"

In the same case (103 U. S., at page 199) the court uses this language: "But we have found no better expression of the true principle on this subject than in the following language of Mr. Justice Hoar in the Supreme Court of Massachusetts in the case of Burnham vs. Morrissey, 14 Gray, 226. That was a case in which the plaintiff was imprisoned under an order of the House of Representatives of the Massachusetts Legislature for refusing to answer certain questions and to produce certain books and papers. The opinion, or statement, rather, was concurred in by all the court, including the venerable Mr. Chief Justice Shaw."

"The House of Representatives is not the final judge of its own powers and priveleges, in cases in which the rights and the liberty of the subject are concerned, but the legality of its action may be examined and determined by this court. That House is not the Legislature, but only a part of it, and is therefore subject in its actions to the laws, in common with all other bodies, officers and tribunals within the commonwealth. Especially is it competent and proper for this court to consider whether its proceedings are in conformity with the constitution and laws, because living under a written constitution, no branch or department of government is supreme; and it is the province and duty of the judicial department to determine regularly brought before them, whether the powers of any branch of the government, and even those of the Legislature in the enactment of laws, have been exercised in conformity to the constitution; and if they have not, to treat their acts as null and void."

Our constitution makes no destinction as to parties. The case is the criterion, no matter who is the plaintiff, or who the defendant. No one in this country is exempted from the process of the law unless especial exemption, under the particular circumstances, is made by the law or the constitution. Even the President of the United States is not exempt from the process of the law. On the famous trial of Aaron Burr, an application was made for a subpœna *duces tecum*, to be directed to the President of the United States; and the application was resisted on the ground that the President was not amenable to the process of the court, and could not be drawn from the discharge of his duties at the seat of government, and made to attend the court sitting at Richmond. Chief Justice Marshall who tried the case, drew the destinction between the President and the King of England, and held that all officers in this country are subordinate to the law, and must obey its mandates, and, therefore, sustained the application. In deciding that matter Chief Justice Marshall said: "It is a principle of the English constitution that the King can do no wrong, that no blame can be imputed to him, that he cannot be named

in debate. By the constitution of the United States the President as well as any other officer of the government, may be impeached and may be removed from office on high crimes and misdemeanors.

"By the constitution of Great Britain, the crown is hereditary and the monarch can never be a subject.

"By that of the United States, the President is elected from the mass of the people and on the expiration of the time for which he is elected, returns to the mass of the people again.

"How essential this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the executive chief will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of a state, at any rate, under the former confederation, and it is not known ever to have been doubted, but that the chief magistrate of a state might be served with the subpœna *ad testificandum*.

"If in any court of the United States it has ever been decided that a subpœna cannot be issued to the President, that decision is unknown to this court." (Trial of Aaron Burr, by Robertson, p. 181.)

The same question as to the superiority of the law over all officers, tribunals and bodies was considered by the Supreme Court of the United States in United States *vs.* Lee, 106 U. S., p. 220, and the doctrine for which we now contend was fully sustained by the Supreme Court. In that case the court said: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authoriy which it gives.

"Courts of justice are established, not only to decide upon the controverted rights of the citizens as against each other, but also upon rights in controversy between them and the government; and the docket of this court is crowded with controversies of the latter class. Shall it be said in the face of all this, and of the acknowledged rights of the judiciary to decide in proper cases, statutes which have been passed by both branches of Congress and approved by the President to be unconstitutional, that the court cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession.

"If such be the law of this country, it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

And in this case can it be said that the speaker of the House, or even the House itself, which is only one branch of the legislative department of the State, is above the law, and that the speaker can with impunity deny to a member a constitutional privelege?

Is not the speaker of the House a creature of the constitution, and the law of the State, and is he not bound to obey it?

It has been repeatedly held by this court that it could examine into the

journal and proceedings of the Legislature to determine whether or not their proceedings were constitutional. Are the duties of this court confined entirely to the works done by the Legislature, and have they no jurisdiction whatever over those who perform the work?

Be that as it may, in this case, the ruling and the determination is on the record and the court is called upon to judge of the speaker by his works; and I ask is it possible that this court has power to declare the action of both houses of the Legislature and the Governor unconstitutional and void, and at the same time it has no authority under the constition to reach the action of the speaker or the action of one of the houses of the Legislature? Are we to understand that it takes a combination of unconstitutional acts of both branches of the Legislature, sanctioned by the chief executive, before the court can interfere to protect the constitutional rights of a citizen or member of the Legislature?

It would be a strange holding for this court to find that if the rights of a citizen are invaded by the joint action of the Legislature and the chief executive of the State they have power to interfere and annul the unconstitutional action, but if the speaker of the House, with the sanction of a part of the members of that body deny a person the same constitutional right the court is without jurisdiction in the premises.

It is a peculiar constitution that must be violated by every branch of the government before the court can interfere.

The language of Mr. Justice Miller in United States *vs.* Lee, is very applicable, if our constitution sanctions any such absurdity: "If such be the law of the country it sanctions a tyranny which has no existence in the monarchies of Europe, nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

The courts of this State and of the United States have been just as careful in guarding the personal rights of individuals and citizens as it has been in guarding the property rights. At different times and under different circumstances, the right to petition, the right of elective franchise, the right of free speech and various other questions involving personal rights have been before this court and other courts of the United States; and the court has never made any distinction and has never, to my knowledge, determined that any of these personal rights were less sacred than the rights of property. What the court could do to protect a man in his property, it can do to protect him in his constitutional rights; and if, as said by the court in the case of U. S. vs. Lee, a person cannot be deprived of his property although "the President has ordered it and his officers are in possession," how in the name of common sense can a member of the Legislature be deprived of his constitutional rights by the caprice and dictation of the speaker of the House? Is the speaker of the House entitled to more consideration before this court than the President of the United States is entitled to before the courts of the United States? I think not; but the decision of the speaker of the House was without jurisdiction, is an invasion upon the personal rights of a member of the Legislature, invades a right which is given to a member to be exercised in the interest of his constituents and of the people of this great State.

The constitution gives the Legislature the right to adopt rules (article 4, section 9), but it has no legal right to adopt any rule which is in contravention to the constitution of this State.

Concerning the rules left to the Legislature, Justice Cooley in his work

on Constitutional Limitations says: "All those rules which are the essentials of law making must be observed and followed; and it is only the customary rules of order and routine, such as in every deliberative body are always understood to be under its control and subject to constant change at its will, that the constitution can be understood to have left as matters of discretion to be established, modified or abolished by the bodies for whose government in non-essential matters, they exist.'

Cooley on Constitutional Limitations, 5th Ed. p. 157.

The rules of the House of 1891 were adopted by this House. The duties of the speaker are embraced in house rules from 1 to 7 (see legislative manual '91, p. 115). None of the rules give the speaker the right to rule upon the constitutional privilege of the member The only power of decision that he is given whatever, is found in rule 2: "He shall decide questions of order." The constitutional privilege is not a question of order; hence he had no right in this case to make any decision whatever in the premises.

He has assumed to decide something which he had no jurisdiction whatever to decide. He has rendered a judicial opinion that certain language was of certain import. Therefore in law it was not entitled to be recorded.

Now, we want to overrule the doctrine of this learned judge. We claim that he has given his opinion without any jurisdiction whatever in the premises, and that this writ lies to overrule the judicial determination of the rights of a member of the House.

There is no power given in the law nor in the constitution to the speaker, to make any such decision, neither has the relator in this case any remedy at all unless it can be found through the interposition of this court.

The very necessity of the case demands that the writ be granted.

V.

Article 4, section 7 of the constitution, exempting members from service of civil process does not apply to process issued to enforce legislative duties.

It has been urged that even if the court should grant the prayer of the petitioner that by reason of the constitution itself, the court is deprived of the power to enforce its order against a member of the House.

Article 4, section 7, provides that "senators and representatives shall not be subject to any civil process during the session of the Legislature, or for fifteen days next before the commencement and after the termination of each session."

The question is fairly presented what is meant by section 7 of article 4? Does that provision protect the speaker of the House from interference by the courts by way of compelling him to discharge any constitutional duty where no discretion is given in the matter, during the session of the Legislature? It certainly does not extend to the clerk of the House, the secretary of the Senate nor the Lieutenant Governor, for they are neither senators nor representatives.

The application in this case is against both the speaker and the clerk, and an order of this court directing the clerk to perform his duty, I submit, would be all that would be necessary to secure to the member his constitutional rights.

But when the clause above quoted is considered in connection with its real object, it has no application whatever to a proceeding by *mandamus* to compel the speaker of the House to perform strictly ministerial duties while engaged in his business in the House.

The object of the provision was to avoid delay by allowing members of the House to be taken away from the House, by civil suits, during the proceedings of that body.

It was well understood that the members of the Legislature would come from various parts of the State, and if they could be arrested or sued on civil process at the place of their abode, they must necessarily be kept away from Lansing and away from the business connected with their office. By no possible fair construction can it be said that the framers of the constitution meant by that clause in the constitution, that a member of the Legislature could not be compelled by writ of *mandamus* to perform a purely ministerial duty in connection with his office as representative, when the thing to be performed was to be performed at the place where he was carrying on the business as representative.

The same question was raised in the case of the State *vs.* Elder, above referred to, and in that case Judge Maxwell said: "It is said, however, that as members of the Legislature in all cases except treason, felony, or breach of the peace shall be privileged from arrest during the session of the Legislature and for fifteen days next before the commencement, and after the termination thereof, as provided in section 12, article 3, of the constitution, that, therefore, in case the speaker should refuse to perform his duty, he could not be arrested and punished for contempt in refusing to abide the order of the court. A constitution, like a contract or a statute, must be construed together, and every part thereof given effect, if possible. The provision of the constitution is merely a re-enactment of the common law. The privilege of the member is not the privilege of the House, merely, but of the people, and is conferred to enable him to discharge the trust confided to him by his constituents. Coffin *vs.* Coffin, 4 Mass., 27. Cooley's Const. Lim. (6 Ed.), 160. In other words, the privilege is conferred to enable the member to discharge his legislative duties."

In this connection, I again urge that the authority given by the constitution to this court to issue *mandamus* is given in the very broadest terms and without reservation. Together with the authority to issue writs of *mandamus*, is given the judicial power of the State, the one is necessary to enforce the authority given under the other. The right to issue writs of *habeas corpus* and *mandamus*, so far as the constitution is concerned, is put upon the same basis. The constitution expressly gives authority to issue these writs and to hear the controversy without regard to the parties interested.

In the matter of Kilbourn referred to in the case of Kilbourn *vs.* Thompson, 103 U. S., Kilbourn was discharged by the court on writ of *habeas corpus* although he was detained by order of the House of Representatives; hence it is established on the authority of the highest court in the United States that the court has the right to interfere with the acts of a legislative body when such body is attempting to carry out its unlawful orders.

Both the House and Senate have placed on article 4, section 7, concerning arrests, the same construction here contended for. During all of the time since 1851 there have been rules concerning the call of the House,

which rules gave the right to arrest all absent members; House rule 22 provides for taking a member into custody, while Senate rule 43 provides, "The sergeant-at-arms or any other person or persons duly empowered by a majority of the members present and voting may be dispatched for and *arrest* any or all members absent without leave, etc."

If the privilege from service of "civil process" is to be given its literal construction, then neither the Senate nor House has any constitutional right to enforce a rule concerning the attendance of its members. Such a construction would be nonsense and defeat the very object of the constitution.

Section 7 of article 4 must be construed in light of the reason of its adoption, and with that in view, it only has reference to civil actions concerning matters not connected with other legislative duties.

The Legislature of the State of Michigan has not passed laws on the theory that the presiding officer of the Senate or House could not be compelled to perform a ministerial duty.

The statutes relative to the payment of the expenses of the Legislature and various officers have provided that they should be on the certificate of the presiding officer.

Could they not be compelled to sign the certificates?

The constitution of Alabama contains the same clause relative to the arrest of a member as does the constitution of this State.

In the case of *Ex parte* Pickett the Supreme Court of Alabama compelled, by *mandamus*, the speaker of the House to certify to the comptroller of public accounts the amount to which a member was entitled as his *per diem* compensation. The jurisdiction in such case was placed upon the necessity of the court's jurisdiction, otherwise the petitioner would be without remedy. The same reason applies in this case.

The constitution of Ohio contains the same provisions concerning the division of the powers and the right of exemption from arrest to the members of the Legislature as does the constitution of Michigan.

In that state the law provides for the manner of certifying to the election of officers, which certificate shall be by both houses.

In the case of State *vs.* Moffitt one house certified to *Samuel* Moffitt and the other to *Lemuel* Moffitt. The party, without having the certificate corrected, took possession of the office.

The Supreme Court held that Mr. Moffitt was not entitled to take his seat until the election was properly certified, and they say (see 5th Ohio, page 362), "Should the two speakers refuse to sign such certificate (a circumstance by no means probable) power is vested in this court to compel them to do it by section 3 of act number 29 of Ohio laws, 56. The Supreme Court is authorized to issue a *mandamus* in proper cases, and in case of such refusal this would be undoubtedly a competent and proper remedy."

In the case of Marbury *vs.* Madison, 1st Cranch's 170, a proceeding against the Secretary of State, Chief Justice Marshall lays down the doctrine that the court, when it is considering the question as to whether or not a writ of *mandamus* should issue, does not allow the position or place filled by the party against whom the writ is asked to control, but simply inquires into the nature of the thing that is required to be done. The court said: "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from

being sued in the ordinary mode of proceeding and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?"

"It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined."

In the case of Sutherland *vs.* Governor, 29 Mich., 320, Mr. Justice Cooley of the Supreme Court of this State said: "In many cases it is unquestionable that the head of an executive department may be required by judicial process to perform a legal duty, while in other cases in our judgment the courts would be entirely without jurisdiction, and as regards such an officer we should concede that the nature of the case and of the duty to be performed must determine the right of the court to interfere in each particular instance."

But supposing that the court should find that it could not enforce the writ; that would be no reason why the court should not declare the law as between the parties. The same question was raised in Pacific R. R. *vs.* Governor, 23 Mo., 257; and it was there contended that the first matter to be determined was whether a *mandamus* could issue against the chief executive of the State, and that in the event that it should be determined that the court had no authority to issue a *mandamus*, then that the judgment of the court on the other questions involved in the case would be extra-judicial and should not be expressed. The court said: "We know of no rule or principle of law which prescribes the order in which the matters of law involved in a controversy, of which the court has jurisdiction, shall be considered. If a question is fairly involved in a controversy, and it is so presented by the parties to it that its determination would settle the litigation, it would be unusual for the court to evade the question presented, and rid itself of the controversy by an opinion that would leave the litigation between the parties undetermined to be again renewed. This is a matter of prudence and discretion, in the exercise of which courts will be governed by circumstances. By the constitution of this State, the Supreme Court has power to issue writs of *mandamus*, and to hear and determine the same. To the delegation of this power there is no exception. The jurisdiction conferred extends to all writs of *mandamus*, without any limitation whatever, and without any regard to the official rank or condition of the party. The jurisdiction granted, it is supposed, is to be exercised as jurisdiction is exercised in all other cases. When a court has general jurisdiction over a subject, and a case arises for the exercise of that jurisdiction, the most appropriate course is to issue the writ to bring the party before it and then to hear and determine the question whether the case made is a proper one for the remedy sought. That the exception is to the jurisdiction of the person makes no difference. That exception, when the court has jurisdiction of the subject matter of the suit, is to be taken and determined like all others after the return of the writ"

What is above said concerning the authority to issue a writ of *mandamus* and the determination of the court upon the constitutional questions is very applicable here. This court will not assume that if it interprets and declares the constitutional rights of a member, as it has a legal right to do—that the Legislature of this State or either branch of it,

would sustain the presiding officer in a plain violation of the constitution after such interpretation. I apprehend that in this case the ruling of the speaker is owing as much to the fact that this court has never defined the rights of a member under the constitution as it is to any desire on his part to deny a member a constitutional right.

In the case of Low *vs.* Governor, 8 Ga., 365, an order was made and served requiring the Governor to show cause why a peremptory *mandamus* should not issue; the Governor appeared in obedience to the rule, and upon his showing cause, the court held that for political reasons the chief magistrate could not by *mandamus* be compelled to perform even a ministerial act. Yet the court gave an opinion settling the law between the parties.

In the case of Taylor *vs.* Governor, 1 Ark., 21, the court neglected to state whether or not a writ could be issued, but gave a full opinion upon the merits of the controversy.

In the case of Marbury *vs.* Madison, 1 Cranch, 50, the Supreme Court of the United States granted an order to show cause and afterwards refused to issue a peremptory *mandamus* on the ground that the law conferring jurisdiction upon the Supreme Court to issue writs of *mandamus* to public officers was not warranted by the constitution; and in that case Chief Justice Marshall gave the opinion that the relator was entitled to the relief prayed; in other words, declared the rights of the parties.

The Supreme Court of this State has declared its opinion even though it granted no writ. In the case of Tennant *vs.* Crocker, 85 Mich., 330, which was an application for *mandamus* to compel the mayor as presiding officer of the common council, to reverse his decision in declaring a certain resolution carried, the court construed the charter, defined powers of the common council, held that the rule of the mayor was simply a ministerial act, and in short the court passed upon the entire controversy; but then denied the writ on the ground that it would only be an idle ceremony, a mere perfunctory act.

In that case the court established the doctrine that it would decide the legal rights of parties, even though it refused the writ. If the court felt called upon in such a case to decide concerning the rights, duties and privileges of persons under a city charter, how much greater is the demand in this case that the court determine the constitutional rights of an officer duly elected by the people of his district, when his rights have been denied him by an important branch of the State government.

VI.

The clerk of the House is not entitled to any exemption by virtue of the constitution, and must obey the constitution and the laws of the State at all times, and is subject to the process of the court.

It is the duty of the clerk, under the rules, to keep the journal. Rule 10 provides, "He shall make up and complete the journal of the House in conformity to the rules." One of the rules of the House (rule 62) provides that rules of parliamentary practice comprised in Cushing's Law and Practice of Legislative Assemblies shall govern in all cases in which they are not inconsistent with the standing rules and orders of the House; hence the House of Representatives has, in express terms, adopted the rules and orders laid down in Cushing's Law and Practice, except as they may be inconsistent with the standing rules of the House. Rule 10,

above quoted, requires the clerk to keep the journal, and under that rule it would be the duty of the clerk to enter the protest on the journal.

Cushing's Law and Practice of Legislative Assemblies, section 410, provides, "The use of protests or dissents, entered in the journal, which in England is peculiar to the House of Lords, prevails here in all our legislative assemblies, and in some of the states is expressly regulated and *secured* by constitutional provisions. By the constitution of New Hampshire, Vermont, North Carolina, Florida, Tennessee, Ohio, Michigan, Iowa and Alabama, any one member of either branch may dissent from and protest against any act or proceeding which he considers unjust to the public or to any individual. *and have his reasons therefor entered on the journal.*"

The right secured under parliamentary law is thus expressed (see same book Sec. 1820). "In addition to the powers of expressing his opinion by his vote, every peer is at liberty to record his dissent with the reasons or grounds of it, in the form of what is called a protest, entered upon the journal and signed by him. *Every one who dissents, is, of course, free to express his dissent in his own way*; but it is customary where several lords concur in the same opinion, for all of them to sign the same protest."

Hence it will be seen that the very book which the House has by rule 62 adopted as its guide and which thereby becomes the law of its proceedings, expressly provides: "*Every one who dissents, is, of course, free to express his dissent in his own way.*"

The speaker not only sets down on the constitution, but declares a member out of order for exercising a privilege according to the express rules of the House. But the rules not having been suspended it is the duty, by the express will of the House, for the clerk to enter the protest in the very language used by the member, and hence all that is necessary is to set aside the decision of the speaker and direct the clerk to perform his duty in the premises.

Hence if it is said that the first duty of the clerk is to obey the mandates and rules of the House, I make answer, that under the undisputed facts in the case, based upon the rules and the journal, it is the duty of the clerk to enter this protest in its very language on the journal; hence if the right of the relator was based alone on the rules, he would have perfect right to insist upon the right of commanding the clerk—who is a member of the organization to which he belongs—to enter this protest on the record; but the clerk of the House is certainly bound by the law of the land, and while the House may direct him in all legal matters, they cannot direct him to do anything in an illegal manner. The House is no higher than the law. The sergeant-at-arms in the case of Kilbourn *vs.* Thompson, was held not excusable by reason of the mandate of the House, and his prisoner was released; and so the clerk in this case, who is charged with keeping the records, cannot excuse himself by reason of the illegal directions of either the House or the speaker even had the rules been suspended. In this State, the right to interfere concerning the keeping of a journal and the necessity therefor is very much stronger than in those states where the bill as passed and signed is conclusive evidence of its passage. It has been held in this court many times that the journals of the House or Senate certified by the proper officer, to wit, the clerk or the secretary, could be used to overthrow the bill signed by the speaker and president and approved by the Governor. That being so, it would seem

that when the question is raised, which involves the manner of keeping the records under the constitution, that there should be no hesitancy on the part of the court in interpreting the constitution and directing the clerk to enter the protest according to the rules.

Supposing that in this case the House had passed a bill declaring that no member should be entitled to the right to protest in any case. The bill was sent to the Senate and passed by the Senate, and was approved by the Governor, after which a member protests; the clerk is required by the rules to keep the records; he announces to the member that by reason of the law passed by the Legislature, his protest cannot be entered upon the journal. The member asks for an order to show cause; the order is granted. Under *such* circumstances would it be improper for this court to pronounce such law unconstitutional? And if this court would have a right and feel that it was its duty to declare such a law, which had passed both houses and been signed by the Governor, unconstitutional, why should the court hesitate to declare a similar law or rule enacted by one man, without the sanction of all the members of one house and none of the other house and without the approval of the Governor, unconstitutional?

Any doctrine that establishes a rule that it is improper for this court to interpret and declare the rights of a member of the Legislature under the constitution of this State when invaded as in this case, reaches simply an absurdity, and in my opinion, comes under the good old homely saying "of being a good deal more nice than wise."

The clerk of the House is charged with a ministerial duty.

The entering of the proceedings on the journal is simply a ministerial act. There is no discretion whatever given to either house under the constitution, in that regard. The record is kept for the people, not alone for the House. Relying entirely upon this fact, this court has repeatedly held that the journal was conclusive evidence of the proceedings of the House. The House has appointed a clerk to perform this duty imposed under the constitution. Now can the clerk neglect to discharge his duty and defend against these proceedings on the ground that he has been appointed by the House? What difference does it make what the appointing power was? The actions of the Secretary of State, who is elected by the people, can be controlled by *mandamus*. Is the clerk of the House higher than the Secretary of State? Supposing the officer against whom the writ is asked, had been appointed by the Governor; could he reply that: "The Governor could not be *mandamused*, and therefore you cannot *mandamus* me." Such is not the law in this State. In this State a *mandamus* has been issued to the head of every executive department excepting the chief executive. Those departments derive their power directly from the people, and it should be considered quite as high authority as the authority of the clerk who receives his power second handed, being appointed by those who have been elected by the people. "The rule," says Merrill on *Mandamus*, section 85, "not to issue this writ to enforce duties which any other person or tribunal can enforce is only one of convenience, and the courts have often disregarded it and issued the writ though the respondent was subject to another power which could compel the discharge of such duty. The writ has been issued to the clerk of the court to issue an execution, to issue a writ of assistance, to furnish copies of his court records on the payment of his fees, to make out and deliver a transcript for use in a writ of error, to receive and file the sheriff's bond

after its approval by the court, to issue an execution for the recovery of land and for damage, to issue a citation to those interested relative to the administration of an estate. In these cases attention seems not to have been called to the fact that relief might have been obtained from the judge of the court of which the respondent was clerk."

People *vs.* Gale, 22 Barb., 502.
Pickens *vs* Owen, 66 Ia., 485.
Attorney General *vs.* Lum. 2 Wis., 507.
State *vs.* Meagher, 57 Vt., 398.
Davis *vs.* Carter, 18 Tex., 400.
People *vs.* Fletcher, 2 Scam., 482.
People *vs.* Loucks, 28 Cal., 68.
Carnochan *ex parte*, Charlt., 216.
Hudson *vs.* Whitney, 53 Mich., 158.

We therefore contend:

1. That the orders and determination of the president and speaker were unconstitutional and illegal and should be declared void by this court.

2. That the president and speaker should be directed, in connection with the clerk and secretary, to enter the protest of the relators upon the journal.

3. That this court should take judicial notice of the changes in the journal, vacate the expunging resolution and require the secretary of the Senate to correct and complete the journal by entering thereon the resolution with the yeas and nays so unlawfully and unconstitutionally expunged therefrom.

4. That even though the court has no jurisdiction over the person of the speaker, it has jurisdiction over the subject matter and can declare the speaker's determination void the same as though it were a law duly enacted by the Legislature, and in that connection, declare the rights of the relators.

5. That under the rules and the law, it is the duty of the clerk and secretary to keep the journal of the House and Senate, and that they may be compelled by *mandamus* to enter the protest of the relators.

I therefore respectfully ask that this court may declare the rules and determination of the president and speaker and the votes of the Senate and House of Representatives unconstitutional and void, and that the president and secretary, speaker and clerk, or the secretary and clerk as the court may find, may be commanded by writ of *mandamus*, to enter the protest of the relators upon the journals of the Senate and House.

A. A. ELLIS, *Attorney General,*
Attorney for relators.

Judge Thomas M. Cooley presented the following argument for the respondent:

I move the court to set aside and dismiss these several proceedings upon the gronnd that they are wholly unwarranted by law, void upon their face, and violative of important principles of representative government, as well as of express provisions of the constitution of the State. At the outset I desire to say that I do not understand these cases to be political in their nature in the ordinary sense of being pressed or defended in the interest of any political party. There is, so far as I am aware, no party

back of these relators that is pressing these proceedings, or that desires, on party grounds, their success, and no party behind these respondents that is undertaking to defend them because of any party interest supposed to be involved. The parties before the court are here prosecuting and defending as individuals and, though it so happens that the relators are members of different political parties from the respondents, it is not on that ground that they are here, but because they suppose rights of their own as citizens or as public officers to be violated; and the respondents are here because they are the persons accused of disregard of those rights and not because of their political affiliations. If the case is made out against them, the respondents must take the consequences as individuals, and their party associates are as likely perhaps as their opponents to feel that those consequences are deserved. That is a question that we have no means of determining if we cared to do so. I only make this statement because I do not propose, in legal proceedings, to take part in mere partisan contests; and in this particular proceeding I am here for the reason stated in the motion, namely, that I believe fundamental principles of representative government are involved as well as the integrity of the constitution of the State.

First, I call the attention of the court to the fact that the order against the speaker of the House at least is obtained in disregard of that section of the constitution (Art. IV., Sec. 7) which provides that "senators and representatives shall not be subject to any civil process during the session of the Legislature or for fifteen days next before the commencement and after the termination of each session." The gentleman opposed to me must contend that the proceeding against the speaker is not within the exact words of this section; but that it is within the spirit of this section cannot in the least be doubted, neither can it be doubted that the people of the State in incorporating this section in their fundamental law supposed that they were making an important provision in the interest of good government. They understood very well that the value of the legislation of the State depended very largely upon the members being allowed to give their undivided attention to the business of legislation while the session continued, and that they should do this under a feeling of perfect independence so far as it was within the power of the people to provide therefor. The continuation beyond the session it is unimportant that we consider here, because what has been done in these cases was during the session itself. It was meant that every member should be undisturbed by the assertion of claims of any sort against him through civil proceedings, and that it should not be in the power of any one to put him in fear of the consequences or to influence him by any threat of civil process obtained against him while the people were entitled to his undivided attention to official duties. They may have had in view the fact that it would be possible to institute proceedings for the very purpose of affecting the legislative sense of independence, and they meant to put it out of the power of interested parties to take from legislators any portion of their entire liberty of action.

Now when we look at this order we see at a glance that it is not only obtained during the session of the Legislature, but that it contemplates immediate service and the following of that service by proceedings in court that must necessarily be concluded during the session of the Legislature if they are to be of any avail whatever. The very purpose of the proceeding is therefore to compel this member of the Legislature to act

under the compulsion of the court, or at least in the fear of that compulsion, in whatever he may do in respect to the matters which the order covers. The clause of the constitution is thus violated, not merely in the fact of the service being made during the session of the Legislature, but in the very purpose of the proceeding itself, for it intends to deprive this member not only of his liberty of devoting his time and attention exclusively to the duties of his constituents, but of his independence in performing them.

The order, in intent at least, is equally opposed to the provision of the constitution in the case of the Lieutenant Governor. He is the presiding officer of one House, and there is precisely the same reason why he should act in entire independence as there is why any other member of the House should do so, and if his official action is to be coerced in a particular direction by proceedings instituted against him in order to bring about that result, the effect upon legislation may be precisely the same in his case as in the case of one who constitutes a member by election to the particular place. To some extent also the officers of the House must be considered as coming within the same reasons; and even if they are not within the terms of this section, it is so plain that they ought to be allowed to perform their functions independently and without proceedings against them intended to operate in the nature of compulsion to their superiors, that the court ought in the exercise of its discretion to have refused this order when asked for. Nobody is entitled as a matter of right to an order to show cause why a writ of *mandamus* should not issue. Every case appeals in a measure to the discretion of the court, and the court should look into the papers in every case so far at least as to make it clear that a *prima facie* case requiring judicial interference is made out; and I need hardly say that it is not made out when the intent of a constitutional provision is violated if an order is made, even although the wording of the constitution does not in terms prohibit it.

The order, moreover, is violative, in intent at least, of another provision of the same section, which provides that "senators and representatives shall in all cases except treason, felony, or breach of the peace, be privileged from arrest," for the order must contemplate as the final result of the proceedings, that this representative as well as the others, if the court shall be of opinion that a peremptory *mandamus* must issue, shall be taken into custody in case he refuses to comply. It is the first proceeding in a case looking necessarily to an arrest; for these relators as well as your honors must contemplate the possibility at least that if a peremptory order is issued this representative, occupying the position of presiding officer of one of the two houses, will deem it due to his position and to the House that has elevated him to it, as well as the constituents who elected him as their representative, to decline compliance; and performance of the exigency of the writ can be enforced in that case only during the session of the legislative body and by the arrest which the constitution declares shall not take place during that period. If this order does not contemplate an arrest as a result of the institution of these proceedings, it is no more than waste paper. It is worthless for any purpose whatsoever. The respondent may disregard it with entire impunity, and he will be expected by the House over which he presides to do so. Indeed if he attempted to obey it he would not be allowed to do so, as I shall show further along in my argument.

Possibly these relators may make some argument on the words "civil

process" as it is used in this section. I shall not stop to discuss any technical reasoning that I may imagine they may enter into in respect to that. Constitutions are framed for the establishment of important principles. They are usually concise in their terms. Their provisions are expected to show or indicate plainly what is their purpose, and they are couched in such plain language as the people at large are likely to understand and appreciate. And that the issue of this order, though it is not a writ, is in direct violation of the plain intent as well as the spirit of this constitutional provision is so obvious, that I care not to enter into any technical examination of the term "civil process," or of any other that is made use of in it. I suppose if it is followed up by any further proceeding, that further proceeding will unquestionably be civil process if this is not. But I am content to stand at this point in my argument upon the fact that here is an order which plainly violates the spirit of this constitutional provision, and that all the evils that can exist in any case which could possibly be supposed, are present here. The order has for its express purpose an intent to put this respondent as well as the others under fear of unpleasant consequences in case it is not complied with, and to the extent of the proceedings complained of to take away altogether his independence of action as a legislator. His attention for the time being will necessarily be to a large extent absorbed by looking after these proceedings, and it is supposed that at their conclusion he will be compelled to conform to an order of this court made in a proceeding instituted for the very purpose of putting him under fear of the consequences.

But a far more important ground upon which I ask that these orders be all of them dismissed out of the court and treated as unauthorized and invalid is because they violate a fundamental principle of representative government in force here and everywhere else where such government exists, inasmuch as they contemplate the subjecting of one co-ordinate department of the government to what, in the mere act of the issue, must be considered an assertion of superior authority in another; a principle that the makers of the constitution of this State incorporated in article third of that instrument which asserts that "The powers of government are divided into three departments, the legislative, executive and judicial," and that "no person belonging to one department shall exercise the powers properly belonging to another except in cases expressly provided in this constitution." I say that this is a fundamental principle of representative government because without it there can be no such thing as free government, and no people has a free government where it is within the power of one department to subject either of the others to its control. This is so well understood that there is not a writer of any prominence upon the constitution of Great Britain or of the United States that has not treated upon it or at least referred to it as an unquestionable principle of constitutional liberty. It is treated at some length in the papers of the Federalist, and in the defense of the American constitution by John Adams. It is referred to frequently by Hamilton and by Madison and by Judge Wilson of the Federal Supreme Court in his lectures on constitutional government; by Burlamaqui and Bentham and Blackstone in his Commentaries. I do not cite the pages where in these works the references or the discussions are to be found, because of course the gentlemen who are attempting to defend these proceedings are familiar with them and your honors are familiar with them. I refer to them more for the purpose of impressing upon the minds of your honors how

important this principle has been deemed, and how carefully these several authors and statesmen and writers upon government have considered it, that the division between the powers of government should be observed with the utmost care, and that each should be particular to see that so far as concerned its own action, it should keep carefully within its own domain. And it is noticeable that in what they say, that several of them have deemed it especially important to remark that when the different departments of the government fail to obey this dictate of prudence and disregard this important principle by over-stepping their bounds, the almost necessary result will be a conflict between the departments in the nature of a war, the one upon the other, and in that conflict, in the attempt of the one to reach out as far as possible into the proper dominion of the other, the judiciary is certain to prove the weaker, and the Legislature the most powerful of the three.

This is very strongly emphasized by some of the writers and statesmen to whom I refer. Thus, Mr. Hamilton in the 78th number of the Federalist says: "The judiciary is beyond question the weakest of the three departments of power. It can never attack with success either of the other two, and all possible care is requisite to enable it to defend itself against their attacks." I might quote from several writers of authority to the same effect but it is not needful. I might give many illustrations of the fact, but I am sure they are not necessary here. I do not cite even these because of any supposed necessity that I should suggest, in this place any lessons of prudence in that regard, but simply because there are proceedings here in which your honors are being urged by counsel of prominence in the State to disregard this fundamental principle, and to press your authority beyond what it seems to me are its very plain bounds, and as indicating one of the numerous reasons why caution is to be observed, that thereby not even a semblance of an attempt, especially when it is entirely unnecessary as I may endeavor to show further on, to assert a superiority of one department over another.

Mr. Van Buren, I remember, is among those who, in treating upon political parties, has called special attention to the fact so distinctly pointed out by Mr. Hamilton. Now in the actual administration of our government I think it can hardly be said to be apparent that the judiciary is the weakest; and Mr. Landon, in his "Constitutional History and Government of the United States," p. 241, has given one reason for this that is of very high importance, I think, as applied to proceedings of this nature. He says: "Under our happy experience the influence of the Supreme Court" (referring to the Supreme Court of the United States) "has proved to be really greater than the power actually conferred upon it; an influence which Mr. Hamilton could not foresee or accurately estimate, but which in its practical results has proved as great as if it had been expressly provided for by the constitution itself." And then he proceeds to show that this influence has resulted from the careful and conservative course of the court itself in dealing with public questions, and the pains it has taken to keep clearly within the bounds of its constitutional jurisdiction.

The framers of our State constitution did not deem it necessary or wise to make the separation of the several departments of government complete and absolute. On the contrary they provided for some participation by the members of one department in duties that would seem to pertain to another, and they left some principles of ancient law in force that

would have the same general effect. They made the executive a part of the legislative power, and they left in the legislative, the power to protect itself even to the extent of exercising judicial authority in some cases. They give to this court important legislative functions in respect to practice and pleadings, and in the exercise of which I suppose the Legislature would have concurrent authority, but all these were for the purpose of perfecting the structure of government at particular points, and were perfectly consistent with that general separation of the powers of government which is indispensable to liberty.

The Legislature, of course, is not the final judge of its own jurisdiction. I wish to emphasize this fact and I trust I may have the concurrence of counsel on the the other side in this principle because it constitutes an important part of my argument, and I should feel my confidence in the correctness of my positions in these cases greatly strengthened if they should assent to this proposition, as I cannot but hope, and indeed believe that they will. The Legislature is not the final judgment of its jurisdiction.

There are many illustrations which I might cite in support of this proposition. One of the most striking of these is seen in the power of this court to render judgments that in effect may nullify a statute or what has been passed as such and been approved by the executive. The case here is very simple. The enactment is presented to your honors in the course of regular proceedings in a controversy, perhaps between private individuals, and if followed it governs the case; but one of the parties calls your attention to a provision of the constitution with which the enactment seems to conflict. Here are two laws seeming to have application to the case, but the one law is higher than the other. It is enacted by the sovereign people themselves, while the other is made by their representatives acting by delegation. There is no question whatever which of these laws is to be obeyed if both seem to be in point. You must enforce the higher law. The Legislature in the particular case has overstepped the bounds of its jurisdiction. The higher law determines that. You, acting in your judicial capacity, must apply to the case the law that governs it, and that is the law which is made by the sovereign people.

And then there may be cases where the Legislature in the assumed right which it unquestionably possesses to protect itself against disorders which impede the proper discharge of duty, may invade the right of speech or the right of the press; may order, for instance, that the publisher of a paper shall be brought before it to be dealt with for a contempt of its authority in what he may have said. If that shall be done and an appeal be made to the judiciary, it is perfectly obvious that a judicial question arises, and that in dealing with that judicial question the court is clearly and plainly within the bounds of its own jurisdiction, and if it discharges from arrest the person improperly accused by the Legislature, it is clearly within the judicial authority in doing so.

A short time ago in the state of Kansas there were two bodies in session each of which claimed to be the House of Representatives for that state. One of them caused a citizen to be arrested and brought before it to compel him to give evidence in respect to a contested election of one of its members. He sued out from the Supreme Court of the State a writ of *habeas corpus*, and the court in determining whether he was rightfully held in custody, proceeded to inquire which of these two bodies was the lawful House of Representatives. One was found to have been composed, when it

organized, of less than a majority of the members who held certificates of election, and to have given itself a majority of members by assuming to unseat some who held certificates and to put others in their places. The Supreme Court decided that the persons who were authorized to organize the House were those who held the certificates of election, and it was not within the power of a minority to proceed as they had done in this instance, acquiring a majority by the exercise of a power which could be exercised only by an organized majority. The necessary result of the decision was that the body which had thus secured a majority was not the lawful House, but that the other which embraced the majority of those who had brought with them the *prima facie* proofs of election was the lawful House. A decision in the case upon the question of personal liberty determined a great question of government, but the case was judicial, and we cannot see how, unless by force and violence, it could have been disposed of otherwise.

But while I insist upon the principle that the Legislature is not the final judge of its own powers, I add also to that, neither is either of the other departments of the government the final judge of its powers. The executive, very certainly, is not, and I presume that it will not be claimed on the part of anyone here that he is. But neither is the judiciary. The difference in the three cases most obvious to the public eye and which sometimes leads unthinking persons to assume that a court decides finally in all cases whether the legislative and executive usurp authority, springs from the fact that the remedies for disregard of the limits of power are different in the different cases. The court may in most cases deal with usurpation on the part of the Legislature or the executive, and may even sometimes punish as offenses what may have been done in excess of constitutional power. The most important remedy, however, in all cases is the remedy by impeachment, and that applies to every one of the departments.

The principle then that no department is the final judge of its authority is emphasized by the fact that not only does the constitution of this State provide a remedy by appeal to the sovereign people even in the case of judges, who in some other states are appointed by the executive, but it puts into the hands of the departments themselves the means of protecting their jurisdiction indirectly, at least, by remedies sometimes of a civil and sometimes of a criminal nature.

The cases before us call for no examination of the limits of executive authority, and I do not care at all to go into that now, farther than to call attention to the fact that in the constitutions of some of our states, and by law in others, powers are conferred upon the Governor that are not in their nature strictly executive. Thus the Governor may be empowered to issue conveyances when State lands sold are paid for, and to perform other duties of a like nature which are administrative rather than executive. He may be required to perform duties in which only single individuals are interested and where the rights are purely private, and there can be no question that if he neglects or refuses to perform these duties, and thereby deprives individuals of their rights, questions of a judicial nature may arise in respect to them, and that the performance of the duty may be compelled in some form, or something equivalent be done that will protect the right. If under some such circumstances the writ of *mandamus* may be issued against him, I do not now question their correctness. I do not care to go into these cases at all, because they are foreign to those

which are presented here. They raise no question of usurpation by the judicial department. They may raise nice questions of the manner in which the judgment of the court finding the private right to be violated shall be enforced; whether, for instance, the writ of *mandamus* is proper or if not, what other form the remedy shall assume. But it is not the particular writ that is in question here; it is the particular power. The precedents which have been made in cases of the nature suggested are wholly unimportant to this discussion. They have no bearing against the argument I present here, that the judiciary is powerless to compel the performance of an executive duty or of a legislative duty when it must thereby override the judgment or the discretionary authority of the executive or the Legislature.

And it is worthy of note in this connection that the two cases in which it seemed most apparent that the court, in its action, was endeavoring to influence the action of other departments of the government are the very cases which most endangered its own authority, and that affected most to its own detriment its influence with the people. I refer to the case of the midnight judges, so called, known as the case of Marbury *vs.* Madison (1 Cranch, 137) in which Chief Justice Marshall expressed the opinion that it was the duty of Mr. Madison, as Secretary of State under Mr. Jefferson, to deliver to certain judicial officers that had been appointed at the very end of Mr. Adam's administration, but had not yet received the muniments of office, the commissions which lay signed in the office of the Secretary of State at midnight on the third of March, 1801. The appointees were to be members of courts just created against the opposition of the Democratic party as represented in Congress, and their commissions had been made out and signed by Mr. Marshall himself when Secretary of State, but at midnight when Mr. Jefferson's newly appointed Attorney General took possession of the papers in the office of the Secretary of State these commissions were still there and undelivered, and one of the appointees, when Mr. Madison by the command of Mr. Jefferson refused to deliver his commission, applied to the Supreme Court for a writ of *mandamus* to compel such delivery.

The Chief Justice, taking up first the question of the right of the appointee to this commission, and holding that his title to the office was complete when the commission was signed and that he was entitled to have the commission delivered to him, proceeded next to the question that had been raised in the case whether the court had any authority whatever to order the delivery, and decided that it had not because the act of Congress which seemed to confer the authority went beyond the grant of power made by the constitution to the judicial department. In other words, he first decided the merits of the case and then decided that the court had no jurisdiction of it; a precedent which your honors would never follow, nor would any other of the higher courts of law in any of the states. The court must first see whether it has jurisdiction, and if it finds jurisdiction wanting it must understand that whatever it may say in respect to the merits of the case for the purpose of influencing the action of others is *obiter dicta*, and that if the intention is to influence the action of another department of the government, there is in intent at least an invasion of the jurisdiction of that department; but an invasion that lowers the dignity of the court undertaking it, since at the best, what it says can be nothing but advice, can be followed up by no order, and may be disregarded with contempt, just as in this case of Mr. Madison and

Mr. Jefferson did disregard the opinion expressed by the court through the Chief Justice.

The other case to which I shall refer is the Dred Scott case. That is a case familiar to us all, in which the court, having had brought before it, as was supposed, the question of the right of a colored man to be considered a citizen of the United States and thus entitled to sue in that court, and having made up its mind that he was not thus entitled, proceeded through its Chief Justice to argue in a most elaborate opinion the question of the right to exclude slavery from the territories; the most important question then pending before the Congress of the United States and before the people; and after having disposed of that by laying down the rule of constitutional law which it was expected the political departments of the government would accept as conclusive and binding, and would therefore govern their action by, proceeded to take up the question of jurisdiction and to hold that the court had none. Here again, and more conspicuously than before, the court lowered its dignity, diminished its influence, and what it did and said on the main question only tended to excite the people and to intensify their hatred of an institution which it was believed the court had gone out of its way to strengthen and uphold.

And your honors will doubtless remember the case of the issue of a subpœna *duces tecum* to compel Mr. Jefferson, when President of the United States, to go from the capitol to Richmond to attend the trial of Aaron Burr, and to bring with him certain papers from the executive files which were demanded by the defendant. Mr. Jefferson had previously sent copies of all papers that he considered to have any bearing whatever upon the case, but he treated the subpœna with contempt, and gave it very plainly to be understood that if any attempt was made to force him away from the place of his duties as chief executive, or to compel him to exhibit to a court papers which he did not deem it for the public interest should be exposed to the public eye, he should protect himself, if necessary, by force. Now I need hardly say to your honors that there can be no such thing in any well regulated government as the existence of a right in one department of the government to issue an order to an officer in another department of the government which that officer may rightfully resist; so that very plainly here was a case of mistake in judgment on one side or the other. Congress, when it desires papers from the executive department, is accustomed to accompany its request for them by the proviso that they be furnished if the officer shall deem it compatible with the public interest.

Now these are some of the reasons for moving considerately in a case of this nature, and reasons why the court should be particularly careful not to allow themselves to be pressed into the taking of action which is even doubtful. But the action in these cases is far from doubtful. The invasion here is plain and direct. The proceedings are not only void in their inception, because the very first step constitutes an invasion by one department of the government of the jurisdiction of another department that under the constitution is not inferior but co-ordinate, but it contemplates the exercise subsequently of compulsory authority to compel a co-ordinate department to conform in important particulars, over which by the constitution that other has complete and exclusive control, to the judgment which shall be dictated to it.

In the particular cases presented, the question involved may seem to be

of minor importance, but I need hardly say that if the judicial department of the government can in one case do what is proposed here and impose its judgment upon a co-ordinate department, it can do so in any and all cases, and in the end it can coerce, not simply the legislative department into the expression of the views of the judiciary as to what should be incorporated into the laws of the State, supposed to be made upon the judgment of its own members, but the executive also, so that what shall be done either by the one or by the other will really be done under the compulsion of the judiciary.

I am aware that it will be said on the part of these relators, since the exigency of their case requires that it should be, that these writs of *mandamus* are not asked for as against the two houses of the Legislature, but against the officers of those houses who are charged with the duty of making up the records of the houses respectively, and of receiving protests that may be presented to them. They will admit, perhaps, that it is not within the power of this court to coerce the legislative action of the houses in any manner, and will disclaim in the most positive terms any intention on their part to override the underlying principles of our government in this regard by anything that they ask to have done in these cases. If we may safely take them at that admission, I do not see that so far as my clients and myself are concerned, we need trouble ourselves any further then with these proceedings. We may retire and leave these gentlemen to take what order they please in the premises if your honors will grant it to them. As litigants here we shall have no further care what is done. We may, as citizens of the State taking a pride in it and in the administration of its law, feel somewhat concerned as to the order that may be made, but as parties to the proceedings we need not trouble ourselves further.

Let me imagine now that your honors grant to the learned Attorney General the order that he desires on these several petitions and let us see what the result may be when he comes to make use of them. Suppose, for example, that you give him the order he has asked against the speaker of the House and the clerk of the House, and he proceeds in person to serve those orders, and demands that those officers proceed to conform to the will of the court as it is expressed therein, and suppose that on that being done the speaker arises in his place and says to the House: "Gentlemen, I am directed by the Supreme Court of this State to make a different record in some respects from that we have made for ourselves, to incorporate in the record already made with your authority, something more, which, on the application of the learned Attorney General, the Supreme Court has decided ought to go into it, and in compliance with that order I will therefore direct that the clerk proceed to reform the record in accordance with the judicial will." Suppose this is said, and immediately some member of the House who happens to be familiar with the constitution rises in his place and says: "Mr. Speaker, how does it become your duty to put anything in that record, or whence do you acquire any power for the purpose? I had supposed that your powers came from the House and not from any outside authority." And the speaker replies that "the Attorney General has complained to the court of my failure to perform a constitutional duty in this regard, and of the failure of the clerk in the same particular, and the order is that I proceed to perform that duty now and make the record complete in obedience to the constitutional requirement that a record of proceedings be kept by

these houses." And this member, disposed to be persistent in the matter, turns to the Attorney General, who is present to see that the writ be obeyed, and inquires of him where in the constitution he finds that the speaker and the clerk shall keep a record of the proceedings of the House, adding at the same time that according to his reading of the constitution *each house* is required to keep a record of its proceedings and not the officers of the House. What will the learned Attorney General say to that? Will he stop right there, admitting that he cannot coerce the House, or will he proceed with his attempt to compel obedience to that writ? And can he compel that obedience unless he first brings a majority of the members of the House to the point of consenting to its officers giving obedience to it? And if he brings them to that point, has not he done it by means of coercion, applied it, it is true, in a roundabont way, but nevertheless coercion of the House itself? And suppose he fails to bring a majority of the House to that point, and the speaker and the clerk, through terror of the penalties of the law, shall attempt to put the record of their proceedings in the form required by the writ, shall assume themselves to keep the record which the constitution requires should be kept by the House, what consequences may they encounter in so doing? Let us bear in mind in considering that question that these officers are the mere agents of the House itself; they hold their office by choice of the House. The clerk that undertakes to write up this record as the order requires may at any moment be removed from his position, may not only be, but in all probability would be removed from his position if he undertook to act in that respect in disobedience to the House and in opposition to its will. He would be removed as disobedient, as usurping authority that did not belong to him, and the speaker, if he were to attempt to countenance the clerk in the act, would himself be dealt with by the House. I will not undertake to say how, nor do I care, for the purposes of this proceeding what, in that respect the House may see fit to do; but I can undertake to say that if the House stands by its dignity and asserts its constitutional authority in the premises, it will give Mr. Attorney General very distinctly to understand, while he is there waiting to see his order complied with, that the constitutional requirement that a record shall be kept is addressed to the two houses and to nobody else, that it is a requirement that ought unquestionably to be obeyed, but in their opinion it is obeyed. Nobody questions that they keep a journal of their proceedings. The only question made by any one is whether that journal is as full and complete as parties concerned have a right to have it made. But that is a question, I shall take the liberty of saying, that addresses itself to the two houses exclusively, and the right is one to be protected by the two houses and by nobody else. Their decision upon that question is just as conclusive as can be the decision of your honors upon any case that comes before you. Judicial questions address themselves to you and though even the Attorney General may perhaps think sometimes that you err in your decisions, nevertheless he must conform to them, even although he might be backed up in opinion by both the other departments of the government. Now if the Attorney General disagrees in this action of the House on the subject what will he do about it? Will he come here again and ask for an order to show cause against every member of the House who has refused to permit the speaker and the clerk to perform, instead of the House, a constitutional duty that rests upon the House itself? If he does not, then obviously these proceedings are absurdities upon their face. The writ

will at once fall to the ground as idle. It is a nullity. At most there could be an expression of your honors' opinion as to what ought to be done in the case, but your honors not being the judges of what should be done in the case, and those who are the judges appearing to differ with you in that regard, they fail to accept and carry out your opinion. The case falls to the ground at that point. The writ could at most only be in the nature of advice, and advice from one department of the government to another department when not asked for, is an impertinence.

But the logical proceeding would not stop at this point. It must be followed up. Those legislators who do not allow your honors' writ to be obeyed must themselves be summoned into court here and your honors must proceed to instruct them in their duties as legislators in respect to what they shall put upon their record of proceedings. One by one you must call them up as offenders against the majesty of the law and you must deal with them. What the end of all that dealing might be under such circumstances, of course I cannot undertake to say; but I can say very emphatically that these proceedings are an absurdity unless they contemplate that the legislators severally shall be dealt with, and, if possible, are a still greater absurdity if they assume the legislators may be dealt with under the circumstances supposed. Now, I am aware that there is a floating idea in the minds of some people that every constitutional duty must be strictly performed by the party upon whom it is imposed, and that any failure in literal performance must be dealt with by the judicial authority. I agree, of course, that every constitutional duty should be performed. Every specific constitutional command should be obeyed. But while I say this, I shall at the same time add, what of course your honors understand perfectly well, and from their very nature many constitutional commands are addressed to some one department of the government and that that department alone is to judge what is a sufficient performance to satisfy the particular command. No other department can intermeddle, and no matter how erroneous the judgment may be in the premises, such performance as it gives must suffice, for it is subject to no coercion. I might give many illustrations of this, and I am afraid that if the executive and judicial departments were to be dealt with by as critical minds as were brought to the consideration of these cases before they were instituted, it might be found that, in many cases, there had been, according to the judgment of the critics, a failure to obey the constitution in some one or more particulars, not merely by the Governor of the State, but by your honors even. Perpaps I may by and by, before I conclude, point out one or two cases in which a Governor, disposed to be nice and critical, and feeling the weight of the burden which the obligation to see that the laws are faithfully executed imposes upon him, might feel impelled to come even into this court and call the attention of your honors to something in respect to which he thought it plain that the strict terms of the constitution had not been complied with, and demand that you proceed to perform your duty in that regard. And I am sure that even in the case of governors so excellent as we have had of late, say the last Governor or the present one, some of these legislators might indicate some points as to which they are justly subject to constitutional criticism. But I am afraid that in every instance in which that would be possible the retort might very properly be made that in the particular case brought to attention the duty imposed by the constitution was imposed upon the particular department of the government complained of,

and was to be performed according to the judgment of that department, or in its discretion, and that if the discharge of the duty was unsatisfactory the appeal, unless by criminal proceedings, must lie to the one tribunal that alone had jurisdiction to interfere, namely, to the people of the State, expressing their opinion through the press and otherwise, and by their ballots as the case should give opportunity; that any interference by either of the other departments as such, especially if accompanied by an assumption of superior and coercive authority, would be not merely intrusive, but highly discourteous. These would be moderate terms to apply to it.

The command that each house shall keep a record of its proceedings is a command of precisely this character. The House keeps a journal of its proceedings; these papers show that. But the House judges what shall go upon that record and its judgment is final. When the Attorney General, or when one of the other departments of the government undertakes to interfere and to require that the journal be made different from that which the House itself has determined it shall be, there is impertinence in the interference, since what shall be said in the premises will be altogether a nullity even though it be expressed in the form of an order from the executive or of a writ from some court. The constitutional power to decide and to decide finally is in the House.

Now I do not feel called upon to defend what may have been done by either of the houses in these cases. I do not think it is any of my business, any more than it is the business of one of the other departments of the government. I have not felt interested in looking into it. By and by, if I have occasion to act in respect to any of these gentlemen in a future election, I may feel disposed to examine into the controversy that has arisen in regard to their doings. I may want to see whether I think they have acted arbitrarily or in disregard of the rights of any one, and if so, I may feel it my duty to withhold my suffrage from them and possibly to denounce them through the newspapers. But that question is not here. What is here is the question of subordinating the department of which they are members, to another department, through the exercise of an authority which the constitution says shall not be exercised. For, disguise it as anyone may, the granting of this order, and still more, the granting of any writ afterwards, will be an exercise by the judicial department of the government of a power that pertains to legislation exclusively. One fact, if nothing else, will make this very plain; namely, that from the very nature of the case there is and must be a discretion in the houses severally as to what shall go upon their record. Everything that may take place while the House is in session is not necessarily a proper part of their recorded proceedings. Legislators as we know, by way perhaps of relief from severe labors, sometimes indulge in mere play that assumes the form of legislation while it is nothing but play, and all of us probably have known of mock resolutions being introduced, and motions made that had no purpose whatever beyond sportive banter; a member was recently married; or was hoping soon to be; or something else equally grave was joked upon; and I hardly think if the opinion of your honors were taken, you would doubt that the House, in its discretion, might lawfully omit from the record all notice of the performances. But there are many cases not so plain as this, proceedings that seem to have some reference to pending legislation, and yet that may strike the House as improper to be taken notice of. Possibly there is some indecency about them; possibly an intent to throw discredit upon the House and malign it; or something

else may be done that very plainly is no fit part of any record which is to be permanently kept of the legislation of the State. Will any man say that the House is incompetent to exercise any discretion in the matter; that it must receive everything of that kind; that the meaning of this constitutional command is so plain and distinct that even the clerk can obey it without taking the opinion of his masters on the subject, or may make the record in disobedience to the command of his masters? Will anyone say that after the House has acted upon the subject it is not an invasion of the legislative province if your honors interfere to overrule the decision that has been made; that if it seems perfectly clear to you that the constitutional provision is violated you may order it to be observed on the ground that the House had no discretion in the premises? Let us see for a moment what that sort of doctrine would lead to. If the doctrine is applicable to the case of making up the records of the two houses, it is equally applicable to the case of legislation itself when the case is such that the line of duty is clear and, in the opinion of your honors, imperative. If it can be pointed out to your honors that the Legislature, in some particular case where by the constitution or otherwise they are required to pass some particular law, have failed to do so, then if we are to understand that your honors may compel the legislative department to perform the constitutional duty, that is a clear case and perhaps more important than that of the making of the record, for your interference.

Let us take the case that is actually before the Legislature at this time. A year ago, on the question being submitted to the voters of Michigan whether a convention should be called for the purpose of revising the constitution, a few thousand of the voters of the State, but less than a majority of all who voted at the election, voted in favor of calling such a convention. They were a majority of all who voted on that particular question, and I see by the newspapers that the Attorney General has expressed his opinion that that vote was sufficient to make it the duty of the Legislature to provide for that convention, although the constitution itself requires the convention to be called only when a majority of all who vote at the election shall cast their ballots in its favor. Now if the Attorney General is right in this opinion this Legislature is in duty bound to call that convention. It must pass a bill for that purpose. It disregards a plain duty imposed upon it by the constitution if it fails to do so. Nevertheless it is possible to suppose that the members of the Legislature may disagree with the Attorney General in his construction of the constitution, and when he comes to some member of the House, say, and I will take the member from my own city, who happens to be a lawyer, as the suppositious member he calls upon, and says to him, "Nobody else is introducing a bill for this convention, and I desire that you introduce one. This is a constitutional duty that cannot be neglected because the constitution is imperative on the subject." And the member from Washtenaw replies, "I do not think the constitution requires it. My construction is different from yours." But the Attorney General responds, "If you do not introduce a bill I shall apply to the Supreme Court for a *mandamus* to compel you." And the member with this threat before him well calculated to make him uneasy, to alarm him, as I have already said the process in these cases was intended to make the whole Legislature uneasy, not liking himself to be subjected to the unknown penalties of a somewhat unfamiliar writ, concludes that he had better draw the bill and introduce it and he does so; and he follows it up afterwards, sees that it is properly

nursed and brought to the period of maturity for actual delivery, and the bill is put upon its passage; but when it comes to be put upon the passage, he thinks he has at last reached a point where he is entitled to vote according to his own judgment, and on calling the ayes and nays on the passage of the bill, the result is, ayes, none; nays, 100. Now what is to be done in the case? These one hundred representatives, entitled as they suppose to act independently and according to their own judgments, not believing that the conditions requiring the call of a convention exist, have voted against it. But in the opinion of the Attorney General they have failed to perform a constitutional duty; they have refused to perform it; they are recalcitrant; they need dealing with; they need the correcting hand of the Supreme Court. If one is guilty they are all guilty; guilty severally it is true, but still all guilty. And can it be, perhaps he will say to himself, that this plain constitutional duty can be disregarded and no remedy be available? Perhaps he will come here and submit the case in one hundred applications for an order to show cause. I will suppose, because of course in a proceeding like this I am at liberty to suppose any impossible thing I please that fairly illustrates the cases that are before us; I will suppose that your honors agree with him in his construction of the constitution, and that you issue the one hundred orders, and these representatives come in here in abject fear of your honors' power and, on being instructed that it is their duty to vote this convention bill, go back to the House and proceed to reverse their action; to reconsider the bill and to pass it. Now who, in that event, has made that law? Is it the House or is it your honors? Is it the Legislature or is it the judiciary? And in the cases now before the court, if by any means these relators succeed through the intervention of your honors, whether by writ actually issued or through fear of such writ, in having the records made as they desire against the will and against the judgment of the House respectively, is it not equally plain that the two houses have not kept a journal of their proceedings, but that your honors have kept it.

Perhaps it may be said in respect to the matter of protests that the case is different and that the applications in regard to those should be granted even if the others are denied. Where the difference is, in principle, I am unable to determine in my own mind, and I shall listen with great curiosity to the argument that is presented on the other side in that respect. There is no doubt, I suppose, of the right under the constitution of a member to present his protest when he dissents from any act, proceeding or resolution which he may deem injurious to any person or to the public, and to have the reason of his dissent entered on the journal. The constitution says so, and I admit the right to its fullest extent. It should be observed and respected. I should say to these gentlemen who are here accused of having failed to respect that right, that if such is the case, they have been guilty of a wrong; but I should be compelled to say at the same time that the House in which any such protest is presented is not bound by my opinion but is itself the sole judge of whether in any particular case the right was or was not respected. From the very terms in which the right is expressed and from the very nature of the case if there had been no such expression, it is obvious that there may be and indeed must be limitations on the right. It is not absolute. No man can have a right to offer a protest in any form he pleases and require it to go upon the record. It may be indecent. It may be addressed in unfitting language to be mentioned orally or other-

wise anywhere. It may be insolent to the House or libelous to one of the other departments of the government, and for that reason be unfit to go upon the journal. It may be of such length that to place it upon the journal would be an absurdity.

Suppose, for example, that one of our good christian friends who believes that the seventh day is the sabbath should deem, when elected a member of one of the houses, that it was his duty to protest against any session of the House on the seventh day, and should prepare his protest in writing and incorporate therein by reference or otherwise the whole of the holy scriptures as proof that the seventh day and not the first was the sabbath, and should insist upon its being spread upon the record. Will any man say that this requirement of the constitution is violated if the House shall refuse to receive and enter upon the record his protest which incorporates the proof without which he would think it insufficiently supported?

Suppose that some one who believes that polygamy is rightful and that the punishment of it by law is in violation of the religious rights of the people shall secure election to the House and shall introduce a bill for the repeal of the laws for the punishment of that offense and when the House votes it down, shall send up a protest against its action and incorporate therein and insist that there should be spread upon the permanent records of the State, quotations from old historians in respect to the action of men of former periods in the history of the world, whose opinions were respected and whose reputations were revered, and especially selections from the old testament showing the existence of polygamy uncondemned in the early ages of the Jewish church, claiming that thereby he had presented evidence that polygamy was condemned neither by the laws of God nor man. May he rightfully occupy page after page of the journals of the House with the direct and indirect evidences which he regards as conclusive upon this subject, not only thereby forcing them upon the attention of the people of the State, but perhaps to some extent unsettling their opinions upon this most important question?

And if there is a right on the part of the House in cases like this to decide that protests shall at least be within the bounds of reason and appropriateness, both as to matter and manner, and even as to length, and that the House may pass upon these questions, are we to be told that the constitutional duty in this regard is so plain, so absolute, so unrestricted, that the putting of the protests upon record with the reasons is a mere matter of clerical work, so that a court, when called upon to compel performance of the duty, has nothing to do but to see whether the protest is received and entered, and that the House is not and cannot be called upon to exercise any judgment of its own in the premises?

Why, your honors, the matter is just as plain here as it is in respect to the journal. The House receives and enters such protests as in its opinion come within the terms of the constitutional requirement. There may be many cases, and probably are some, where the question is a somewhat nice one whether a particular protest ought or ought not to be received and the reasons entered, and in those cases any of us might perhaps disagree with what had been done. But in some cases it must be very plain that the protest should be received, and in some others equally plain that it should not. The point is that the question of judgment and discretion is addressed not to us, not to any court, not to the executive department, but to the House itself. The House should do what is just in the case,

and if it errs, the great tribunal which alone can deal with the case should deal with it properly through the public journals and as coming elections may afford the opportunity.

Now here I will suppose again that the Attorney General, persisting in his application, shall be enabled to convince this court that I am entirely in the wrong; that the protests set forth in these proceedings should have been received and entered; that the Lieutenant Governor, in what he had to do in respect to them, should have done what was required, and that as a result of your opinion in the cases he shall be ordered by writ of *mandamus* to do what is asked of him, but that when he undertakes to do it, if he shall do so, he shall discover that any duty in the premises is not imposed upon him, but upon the Senate, and the Senate, not being itself ordered to act in the premises, but having the right to control his action, shall refuse to allow him to do otherwise than has already been done; that he himself shall thereupon conform to the requirement of the Senate instead of the requirement of the writ which has been issued; that the Attorney General shall thereupon proceed against him for contempt of court and he shall be arrested and convicted and ordered into imprisonment if he is still contumacious, and the officer of the court shall proceed to confine him. Now I think, your honors, when the case has reached that point, if I am still connected with it, I should ask that the imprisonment for contempt take place not at Mason or Jackson or anywhere in this State, but in Chicago as a part of the great show that is soon to be exhibited there. The sight of the Lieutenant Governor, imprisoned for declining to do in respect to his legislative duties what the Senate will not permit him to do, would in this great exhibition year be one of great interest, not only to those who come from countries where representative institutions exist, but quite as much to the subjects of despotisms; and I should be perfectly willing to stipulate as counsel, that no objection should be taken to what was done upon the ground that the imprisonment was out of the State. It could not possibly be any more void because being out of the State than it would be in it. When a proceeding is absolutely void from commencement to conclusion, there can be no degrees in the invalidity.

But, your honors, there are some other provisions of the constitution that I may as well call your attention to in this connection for the purpose of emphasizing the position I take, provisions that necessarily, from the nature of the case, are addressed to the department of the government which is to act upon them, not to anybody else. A man is not supposed for that reason to be deprived of his remedy if the constitution is not obeyed. It is assumed that the proper department will obey it, and will do what is right in the premises; will exercise its discretion and its judgment so as to ensure the right. This is not always done, I know. Mistakes are made by governors and by legislators and even by courts. Your honors are called upon to correct a great many judicial errors, and the highest court in each state of the Union is frequently, in effect, told by the Supreme Court of the United States that in particular cases it has done what is wrong and has failed to obey, perhaps, some constitutional requirement. In other words, to state the case exactly as it is, it is found that when one court has acted with the utmost fairness and considered the case in all its bearings with the greatest patience, with a purpose to judge rightly and fairly and do justice, some court with an appellate power in respect to its judgments disagrees with it. And that is exactly what may

take place in any case where the Legislature is thought to have not judged rightly or acted discreetly or justly in the assumed performance of some constitutional requirement. The great appellate tribunal, and the only one that has anything to do with the case may review the action in any manner that may be open to it, and deal with it as the judgment of those entitled to act in the particular case may seem to require.

And now I desire to remind your honors that if the Legislature is to be coerced by means of the writ of *mandamus* when it fails in the performance of a plain constitutional duty, the executive of the State may, on precisely the same grounds, be subjected to the discipline of this court. There are some provisions in the constitution which impose duties upon him which he has no right to evade, and which I am sure he has no disposition to evade; but which nevertheless he might think can best be performed in a manner that your honors would think not the most effective or suitable.

Thus it is made the duty of the executive to take care that the laws are faithfully executed. Now let us suppose a riot to arise in some part of the State, growing out of disagreements between employer and employé, and that it should have continued until a plain case had arisen demanding the intervention of the executive. The Governor might have sent the militia for the purpose; but he might also feel that the most effectual step to take in the case would be to send the learned Attorney General to reason with the rioters and to bring to bear upon them the quieting influence of kind words. Most of us probably would agree that this action in the premises was perfectly right and likely to be more effectual than any resort to force. But it is possible that some one interested pecuniarily or merely as a citizen of the State, opposed politically to the Governor, would charge him with an evasion of public duty in the premises and would demand of him that he call out the militia, and present to these law breakers the plain purpose to bring to an end their rebellion against the laws, by military force. Suppose the Governor to decline obedience to this demand, and the dissatisfied citizen should present to this court his petition for a *mandamus* requiring the executive not to palter with this provision of the constitution but to perform it by taking the effectual step for that purpose; which the petitioner would insist would require the dealing with it with bayonets instead of honeyed words or mere appeals to reason. Continuing the impossible supposition, because in that way only can we deal with these cases, suppose your honors to issue the writ of *mandamus* and the Governor, who had in good faith exercised his own judgment and discretion in the case in a way that I should myself feel compelled to say was unquestionably the best way, should refuse to send the bayonets and persist upon relying on the remedy already ordered. What could be done in such a case? Your honors find the constitution not complied with. The Governor, in your opinion, is not seeing that the laws are faithfully executed. True he is another department of the government from you, but that, if we understand these applications, must be unimportant. Will your honors, when the Governor refuses compliance, order him imprisoned for his contumacy? It is an awkward case to suppose, it is true, and I will not assume to predict the probable result. He might prove contumacious, for he has something of the old Jackson about him, and then he would return some answer which indicated that he considered the question of remedy in the case to address itself to him and not to this court. Possibly your honors on the

application of the relator in such a case, would issue your writ for his confinement in prison until compliance was made. Now I have not looked into the authorities at all to see whether a Governor would have the legal power to pardon himself for an offense which constituted a contempt of court, nor do I care to. Of one thing I am very certain, that his pardon of himself for that or any other offense could not by any possibility be more completely void than would be your honors' order of imprisonment. If you can *mandamus* him into the prison, he can certainly pardon himself out. And since holding the Governor of the State or anybody else in prison under a void warrant would be a much more risky proceeding on the part of the jailor than would be the letting him go, we might see the prison doors thrown open, whether the pardon was considered valid or otherwise.

But your honors, let us direct our attention for a moment to the duties which the constitution imposes upon the judiciary, and the commands which it makes in that regard. One provision of the constitution is that the Supreme Court "shall by general rules establish, modify and amend the practice in such court and in the circuit courts, and simplify the same." It has been thought by a great many people that this command is not obeyed; that it cannot be obeyed in its spirit unless the court shall introduce something like the codification which prevails in other states. It is said the power of the court is ample for the purpose and I think the attention of the court has sometimes been called to this particular provision with a view to secure its attention to it and action under it in the direction of codification. When that has been done the answer in effect has been, so far as I know, that the practice in this State now was as simple as it could well be made; that it was no more subject to technicalities, unless they were introduced unnecessarily by practitioners, than was the practice in any other state where codification had been resorted to; that pleadings that would be good under any system of codification would be perfectly good in this State. It is only necessary that a man state, either in a suit in law or a suit in chancery, the facts which constitute his cause of action, and the pleading as the commencement of proceedings would be sufficient. If anybody thinks otherwise and thinks the court has neglected its duty in this regard, will he, if a man of sense, doubt that this command, though expressed by the most imperative word applicable in the case, is one that is addressed exclusively to the particular court named? Has the Governor anything to do with it? Can the Legislature order its performance?

But the court is no more independent of the Governor or of the Legislature than the Governor and the Legislature are independent of it. It is for it to judge whether this requirement is in its spirit obeyed by what is done by the court, and it is for the people, when the several judges come before them for re-election, to decide whether there has been such a neglect of duty in the case as ought to be dealt with.

Returning to the Governor's action, I take pleasure in saying that I remember the days when the office of Attorney General was filled by gentlemen like George V. N. Lothrop and Jacob M. Howard, of whom every citizen of Michigan was proud; men whose eloquence and whose logic, as I listened to them, I found almost invariably to be taking my reason and my feelings captive; and I cannot doubt that the present incumbent of the office, when his powers of persuasion in such cases as I have suggested, are employed, will find them equally effective.

Now if the Governor should subsequently inform me that your honors

differed with me in opinion, and with him also, and had issued a writ of *mandamus* commanding him to send the bayonets rather than the eloquence, I should be amazed by the command, and should feel compelled to advise him that the order made must be understood in a figurative sense. You could not possibly mean that actual bayonets should be sent, that actual cold steel should be made use of; but only that the Attorney General, if he found that the words of reason and of conciliation did not avail, should resort to words of a different nature; words as keen as steel, as piercing as bayonets; and by that means force the rioters to an understanding of their proper duty of obedience to the laws, where he had failed to persuade them. But even if this means of repressing disorder should prove altogether unavailable, I should expect the Governor to still act upon his own judgment in the premises and to resort to such other method of restoring peace as in his opinion should prove best; for it is his duty to see that the laws are executed by such method as satisfies his judgment and not according to any methods prescribed for him by gentlemen not charged with the duty, however learned and eminent.

In speaking of protests and of the manner in which the right to protest might be abused or exceeded, I did not allude to one method which I think is that which most often is brought to our attention, an abuse, namely, resorted to for giving prominence to the protestor himself with a view to some incidental benefit that thus may accrue to him. I think that your honors can well understand that this may often be the motive, and that when we come to see the protests themselves, if we trouble ourselves with them, it will be apparent that prominence to the member and possibly an incidental benefit to result from that prominence, has been had in view in many cases, rather than any aid that may flow from the protest to just legislaton or any proper protection to individual rights. I should not allude to this here if it did not seem essential to the completeness of my argument, for I understand very well that these relators are sufficiently elevated in position in the State and in the confidence and respect of their fellow citizens not to be tempted or to admit of our even suspecting that here there has been any such purpose. But what does not exist here may exist in the very next case that is called to your attention; and I desire you to note that the result is likely to be not merely something foreign to the proper business of the House, but something that will tend to embarrass legislation and thus to do mischief instead of accomplishing benefit to anybody.

It is possible that in what I now say the court may be at first inclined to think that I ám wandering into irrelevancy. But I beg your honors to bear in mind that when a case is itself irrelevant and it is not to be found anywhere within the bounds of judicial authority, I am under the necessity of wandering away in search of it. And it is for that reason that I here venture to say that probably the true reason why there is so little abuse of the right to spread upon the records of legislative bodies protests against action taken or declined is because all observation teaches us that the reputation expected to be obtained thereby is always missed. If nothing is gained in indulging the right, nobody will trouble himself to abuse it. There may still be protests when there ought to be; but when they accomplish no beneficial purpose, and simply occupy uselessly the time of the body and the valuable space on the record, we are not likely to hear of them. I am confident that the observation of your honors must concur with my

own, of which I have given my opinion above. Solid fame never comes from them.

Senator Benton at one time in his career attracted great attention throughout the nation for his protest against the action of the body of which he was a member, in passing a resolution of censure upon the action of the President; but the whole story is now a source of amusement rather than a lesson of value in legislation, because of the method he adopted in his motions and speeches and in his persistent caution that his resolution should show not merely that the censure of the President had been expunged from the journal by the word "expunged" being written in large letters across it; and that the resolution for expunging it had declared that thereby the censure was erased and obliterated and forever put off the journal. The whole affair now strikes us as one in which important time was occupied in the highest legislative body of the country with speaking and maneuvering for partisan effect and yet that in the end nothing was accomplished that was of value to anybody. It doubtless intensified the feeling of the President's partisans somewhat, but it did the same with the feelings of his opponents. It won no votes for the one party and it lost none for the other; and if the Senator had never performed for the country or for himself any service more valuable than that, he would scarcely be remembered in history, and no one would ever think of such a thing as writing his biography as that of an eminent statesman.

Now the conclusion I desire may be drawn from this demonstration of the uselessness of protests to those who make them, is drawn only for the purpose of showing that after all, in the particular case of a rejected protests here, no harm has resulted to the individual, any more than to the public. This is no reason whatever for rejecting a protest, but it is a reason for leaving the decision upon that protest to the House in which it is made, and for not at the same time occupying the attention of legislators, and especially of the presiding officers, in pressing the action of the body to which they belong upon the attention of a court already over-occupied with its legitimate business. And it is also a reason why, even if the court had power to act in the premises, the writ of *mandamus* should not be allowed when the operation must be in the nature of a *certiorari* to take away from the popular tribunal the jurisdiction over these cases and to remove them into a court where complete justice would be impossible, even if it were not, as in this case, entirely without authority.

I might perhaps illustrate what I have said as to the constitution, when it prescribes duties for the several departments of the government, addressing itself to those departments and not to any other, by referring to the right of petition. By the constitution, as you remember, the right of the people peaceably to assemble and petition for redress of grievances is made as inviolable as it is possible for words to make it. Words of command indeed are not used in the case, but no exceptions to the right are made; and beyond question it addresses itself especially to the legislative and to the executive departments who are expected to obey and respect it always. No one, I suppose, will for a moment doubt what I say upon this point. The limitations are that the people shall assemble peaceably, and that the petition shall be for redress of grievances. And yet, from the very nature of the case, there must be some authority vested in the department addressed to decide in any particular case whether these conditions exist, or whether in fact what is presented to them is properly in the nature of a petition. Now there is at this time a considerable fraction of the people

roving about the country and presenting oral petitions for means of subsistence at the kitchen doors of the people and obtaining much sustenance thereby. These persons as much as any others are entitled to present petitions to the Legislature. Suppose fifty of them to enter the Senate Hall in a peaceable manner and to deliver to the Lieutenant Governor then presiding a petition beginning with a preamble that the world owes them a living and is not properly performing its obligation in that regard, and asking that the Legislature shall make an appropriation giving them a dinner at Hotel Downey more suited to the sustenance of a human being than what they obtain by their oral petitions. Now if the Lieutenant Governor, on seeing what the paper is, shall cast it into the waste paper basket and shall direct the sergeant-at-arms to invite the petitioners to leave the room, will it be said that this is a clear case in which the right of petition has been violated? Or will it be said on the other hand that this is one of those cases so clearly not within the intent of this constitutional provision that what he has done was perfectly right? If the last is said, there will be fifty men in the room disagreeing with him, and with just the same right to express their opinion in a proper manner and at proper places as any other members of the State. If the first shall be said, we should be compelled to say, also, that between a clear case of unconstitutional denial of the right and a clear case where the Legislature must respect it, there may be many others of doubt upon which somebody must decide. Shall it be this court or shall it be the House to which the petition is presented?

I see by the newspapers of the day that only two weeks ago after certain members of the House had absented themselves without leave from one of its sessions and were brought up in consequence to be dealt with, one of the delinquents assigned for his excuse that he had been rendered disabled for a time from the performance of his legislative duty by the eloquence of one of his fellow members in behalf of female suffrage, and another moved that the delinquents be all laid upon the table, and another that they be laid under the table, and so what was evidently intended as sport went on. Now there is something about these proceedings that is likely, I think, to be somewhat disagreeably suggestive. Your honors may be as ignorant as I am of exactly what was intended by these several motions, and especially a motion that a delinquent be laid under the table, but it seems to me that there may be a suggestion here of something that the mover did not like to incorporate in words. A suggestion of something that if he had fully expressed in writing and caused it to be published would have been libelous, and for that reason he deemed it safer to suggest the charge than to express it, where the suggestion would nevertheless have precisely the same effect. This I say is what seems to me may be the fact, and if it seems so to me it may possibly appear so to someone else, and the member at whom the motion was aimed may be injured among his constituents thereby.

Now if your honors, at the conclusion of the arguments that shall be made on the other side, shall feel impelled to decide that it is your duty to make up for these houses the record which the constitution says they shall keep for themselves, I trust that I may be permitted before the order is entered to present to your honors a petition respecting it that you will allow all these proceedings, inasmuch as they did not bear properly upon the legislation which followed, to be treated according to their apparent nature, as by-play or as defects, and omitted from the record you

make up. If the speaker himself has allowed them to be omitted, if the clerk has dropped them out, if the House itself has, either silently or by positive order, directed that they be omitted from the record which is made up, I shall pray that the record, though obviously incomplete according to the logic of these gentlemen, shall still be allowed to stand as it is.

We are all proud of our citizenship in Michigan. We have doubtless all of us something of the feeling of that old Roman when he could lay his hand upon his breast and announce with pride "I am a citizen of Rome," knowing that thereby he expressed a distinction that the whole world would recognize. We also are proud of our citizenship and the pride which we feel we hope will be felt also by those who come after us in the distant future; that they shall be proud of what it will be then and of what it is now; and if a thousand years hence we can believe that amid the ruins of some Michigan city, if there shall be such ruins, there shall be found a copy of the legislative journal of 1893, containing a complete record of everything properly pertaining to legislation, but also containing proceedings like those I have referred to, shall we not, all of us, in contemplation of that fact, feel genuine regret that the House itself, when passing upon the question of what was the record that the constitution required it to make up, did not decide that it might properly omit from it all by-play of this nature?

Frivolity will undoubtedly be indulged without harm occasionly in the proceedings that lead up to legislative conclusions in the making of laws; but allow us, I shall pray you, to appear dignified in the records themselves.

But, your honors, the reference I made to the proceedings on the occasion referred to remind me that the records that the legislative bodies have been in the habit of making up ever since the foundation of State government, have been defective in one of the most important particulars. They have contained motions and resolutions and entries of the fact of the presentation of bills and all that, and yet the most important part of their proceedings, with the single exception of that which relates to the actual entry of and voting upon bills, has always been almost entirely omitted. Your honors doubtless will anticipate me in what I am about to say, that the speeches of members scarcely appear upon the records at all. And yet in these consist a very large part of the legislative proceedings, and with what plausibility can a man say that a journal contains the record of proceedings when these speeches are omitted? It is insinuated here that one member of the House made a speech upon woman suffrage. The speech may have been an elaborate and carefully prepared one which would, if published, have been of the very highest value to the people of the State. I do not know whether it appears, even the making of the speech, upon the journal of the House or not, because in the reading of the journal I have not reached the proceedings of that day, but I am told it is not published in full. That member then is wronged, but not he alone. It may be that the speech was supported by the member from Jackson who appears as relator here, or that member may have presented the other side of the case, and yet neither speech is found in full upon the journal. The loss to the State if they are not presented in full I shall not of course attempt to estimate. It is not at all important for the purpose of my argument.

What I desire your honors to understand is that if a full record is to be

made up, not only will it fail of completeness, but will not even approach anything like completeness, if it omits the very large and valuable portion of the proceedings which consists in the speeches of the members. Some legislative bodies allow every member to have his own speech spread in full upon the records if he desires it and will furnish the manuscript for the purpose, but the general result is then that only a few of the speeches appear in full, while as to the most of them, a brief synopsis only is given and perhaps only a brief reference to the fact that a speech was made. Now, your honors, when a record is kept in this way, you see at once that it is very far from being a complete record, and it is very far from being such a record as the public are entitled to have, if all the proceedings must appear. A record thus made may tend to exalt the importance perhaps of a single individual, but it may not accomplish completely even his own purposes, because he has a right not simply to have his own speech appear, but also the speech of his opponent, in order that it may be seen by contrasting the one with the other how weak is the logic opposed to his own; and especially does such a record fail to meet all the requirements of the constitution, since the tendency is rather to mislead than to enlighten the people; and the enlightenment of the people themselves I take to be the most important part of this requirement.

The speech referred to here seems to have been upon woman suffrage. Now if the whole debate upon that subject had been given us in full, we might have been prepared in the coming elections, and especially as we became members of the Legislature, to act intelligently upon it. Now, all that we know upon the subject is that the present Legislature has, by a bare majority, decided against it. There may have been reasons for the action of some legislators, which they were unwilling to include in their remarks for publication; but we were entitled to have them; and if they did not appeal to our reason, we should, when the same subject came before us hereafter, have acted, not with them, but against them. Possibly this very debate was so conclusive that it might have settled for our State for all time the policy in regard to equal suffrage. It might not be necessary ever again to present the question to the Legislature. We are in entire ignorance now upon the subject, and are incapable, from anything that appears upon this journal, to express any opinion upon it. We are wronged in that regard. What force are we entitled to give to the mere fact that the proposed bill was rejected? Why, it may have been rejected for many reasons perhaps, which would have not influenced the people of the State at large in the least. There may have been private reasons. There may have been home reasons. There may have been appeals of single individuals upon grounds that did not affect the merits of the case. What is now a mere lifeless skeleton of the proceedings of the day, if the debate had been given completely, might have been full of fire and spirit; and we should not only have been convinced by it as to the action that our legislators ought to have taken and that we ourselves should take in the future, but we might have taken pride as citizens of the State in the debate itself. Now we are likely to get only the speeches of these relators and of others, if there are such, of equal eminence in the two houses, when we can obtain them as part of their fully published writings and speeches when they can be had when placed upon the general market. Why, your honors, how unimportant do these protests appear when we attempt to contrast them with the speeches that may have been made. In point of fact they have no

importance whatever, except for the opportunity they give for the discussion of great principles, and that opportunity, instead of wronging these gentlemen, may be to them of immense value. If they were moving here in their own interest instead of in the interest of the public as they are, instead of asking that this court treat these presiding officers as criminals, they should have arisen in their places and returned thanks to the officers for the supposed wrongs, done, which at the most were only apparent wrongs, and would have given them an audience of the whole people of the State if the record of proceedings had been made complete as it should have been. And when your honors shall have made an order for the publishing of a complete record of proceedings which these gentlemen seem to be asking for, but which it is evident they do not expect if their prayer is granted, is to be set out in full, I shall pray your honors in the interest of the people of the State to follow the logic of the reasoning which has led to these petitions, and to make your order broad enough to compel the putting into the record of the most important, I had almost said this vital part of the proceedings of the two houses.

I press this upon your attention because there are always legislators who, not being themselves men of eloquence, might be disposed from mere jealousy to cause the record to be made up in such a way as to omit the eloquence that comes from others; and consider what a loss that would be. The men who fit themselves for distinction in these houses have perhaps begun early. They have trained themselves in oratorical contests in the colleges of the country, they have practiced their eloquence in speeches to the cattle on a thousand hills, they have carefully considered the precedents of great women who were great rulers when the discussion upon suffrage was before them, and in every way they have striven to make their efforts here worthy of the legislation that was to govern not the present generation alone, but generations that were to come, and perhaps for all time; and shall their associates, who, because they are not themselves eloquent, are jealous of those who are, be so allowed to so make up these records that all this solid matter, more worthy of permanent record than battles and sieges, which often are without importance except for the lives which are taken, shall be altogether omitted from the permanent record? Shall envy be allowed to govern, and genius and eloquence and careful study and full consideration of great subjects be allowed to pass into oblivion? I cannot believe it, your honors. When you adopt the logic of these gentlemen as it is exhibited in these proceedings, you must follow that logic to the conclusion that will require you to put upon record everything that takes place in the two houses; but especially everything that goes to constitute the principal value of the proceedings. When the time comes that the officers of the two houses, when your honors issue the writs that are to command the correction of these journals, shall take to the woods for fear of the consequences of not complying with the command because their official superiors will not permit them to do so; and when as a consequence you are compelled to send, perhaps, your own clerk over to the other side of the capitol to make up for the two houses the records which you cannot otherwise get made up, I shall expect to see that the order is made broad enough so that the clerk will understand he is to incorporate in the records the legislative discussions. I may perhaps suggest however when we reach that point that as the Governor is supposed to be of equal and co-ordinate authority with the court itself, that it would be much better for him under his power to see that the laws are enforced, to take into his own

hands the proper correction of the legislative journals. He commands the militia of the State, and there is scarcely a company in the State that has not within its ranks stenographers who could give us the complete record. And if he shall order out a company for that purpose the others can protect them with their bayonets while the duty is being performed. A species of martial law will necessarily prevail, but this will be a convenience rather than a hindrance to the full performance of the duty, for if a member, perhaps because he feels that a speech he has made from written manuscript is hardly up to the requirements of the occasion and does not answer the argument on the other side as completely as he thinks it should, shall refuse to hand over the manuscript to the proper recording military officer, who for the time being has displaced the civil clerk, he can be dealt with as the case shall seem to require. But whether your honors shall take control of the case yourselves or leave it to the executive, I trust there will be no failure to make the record complete.

The omission from the record is that which was designed to enlighten us upon the great questions of the day, and to teach us in the future how it will be our duty to vote. It is all very well to enter here the presentation of bills and resolutions and the offer of protests and all that, but we shall never feel that we are standing upon the solid ground of reason and logic until there shall be given to us the speeches of the representatives which we have sent here for the purpose of enlightening us upon the great questions of the day.

It may possibly be said on the other side that there has been and is no complaint in the matter of giving the people a record of debates. This, however, is of little importance. These gentlemen must be prepared to follow the principle they insist upon here to its logical conclusion wherever that may reach. The man who shoots a deer with people beyond and within range and in plain sight, and kills the deer and also some human being, can hardly plead in extenuation that he aimed only at the deer. The bullet will not stand suspended in mid air. The propelling force must be spent upon it, and he who fires must be prepared to face the natural consequences of what he should have foreseen. And so it is with great principles like the one that is now in issue in these cases. If these gentlemen insist that the protests shall appear in full in every instance, they should stand with me in insisting also that the debates should appear as well; and just as the life of a man is more valuable than the body of a deer, so is a discussion on great principles of government likely to be more valuable than any protest that can be sent up to the chair in respect to any of the proceedings of the house in which the discussion takes place. Perhaps I may indulge the thought that these relators brought these proceedings here for the very purpose of having yourselves or the Governor give such instruction to the legislative department of the government as should hereafter insure the making of such a record as would give to the people of the State the instruction to which they are entitled in the matter of great principles.

Here was a measure pending that was designed to accomplish a revolution that might be one of the most beneficent of all ages. It was to bring peace to families, integrity to public life, temperance in society. It was to punish corruption, make the schools accomplish more completely their purpose, and scatter blessings on every side by locating the pillars of civil society on a new foundation of equal and exact justice. And all this was to be accomplished peaceably. There was to be no impact of armed

forces, no widows made, no children orphaned, no pension list to come as the result of a great reformation; but peacefully as the morning dew it was all to be accomplished, and by the force of reason alone. And here was a discussion upon that reform, one of the steps that was expected to lead up to it, a discussion that was intended as our preparation for it. And yet this record which the constitution in the most imperative terms commands shall be kept, is so imperfectly kept that from such report as we obtain from it, it is impossible to tell with any degree of satisfaction to ourselves what part we ought to take in this great radical change in our political institutions. The speeches that might have made us wise are omitted altogether; and yet we must bear in mind that the State has paid for all these speeches when it paid the *per diem* of those who made them and the people were entitled to the free reading of them in the record. Not only every citizen of the State who was unable to be present, but those who were here, since now if they obtained the speeches at all, they must of necessity go to the book stores for them and pay for them over again. By all means let some department of the government give us the record; but let us have it in its completeness.

With some hesitation I shall venture to make a reference to ancient history as tending to illustrate the views I present. I hesitate because I feared your honors might think that American law ought to furnish sufficient illustrations of the principles I advance here. But we are at liberty I suppose to press history, however ancient, into our service whenever we can make it useful, as much in the law as elsewhere; and I am emboldened to do so here by noticing that the Supreme Court of Kansas recently in an important case made an ancient Greek general play an important and very valuable part, and I did not see why I might not do the same with an old Roman, who was both general and civil ruler. I refer to Mark Antony, and particularly now to his oration over the dead body of Cæsar. The case is strictly in point, because he at the time was in himself the constitution of Rome. If the relators in this case had followed the example of Antony and appealed to the popular tribunal, I cannot doubt they would have taken captive the feelings of us all and rendered sure the overthrow of the assassins of the constitution; but Antony paused for no protests; he came forward in the most innocent appearing way and spoke in polite and captivating terms of the well beloved Brutus. Had his example been followed here, had the protest been put aside by the relators contemptuously as of no value, and the legislative audience been called upon, as their attention was challenged to the violated constitution of the State, and they were told to see what a rent the envious speaker made, we might now have had instead of one masterpiece of funeral eulogy, two or more that would have challenged the admiration of the ages. Why, your honors, that one oration gave to Antony dominion over half the world and added vastly to the fame of Shakespeare himself; but what would Antony have been to us as an orator if he had lacked his reporter; and how are we to know when another Antony appears in the capitol unless his fame is given to the world as it should be in the only manner now possible. Antony addressed a few thousand citizens of Rome, but a Michigan legislator speaks to two millions of people, and he must speak through the record whereby alone he can reach them. The party papers only mislead, for they give in full the great speeches of their own party orators alone; but the record would speak with impartiality to all sides; it will give when it has the completeness

my argument aims at, with entire impartiality, not only the arguments of members, but those also which disfranchised women will make to the world whenever the legislative body allows her the liberty of so doing, as part of its proceedings.

Your honors, when this matter was before the Legislature, I cannot doubt that some one called to mind the fact that if Antony gained dominion of half the world by his oration over Cæsar's body, he lost that dominion in consequence of sharing his power with a woman. Some other member may have shown to the entire satisfaction of the House that the precedent was worthless; but of what avail could that be to the people of the State, the real audience, when the complete record was not made up? The orator's party papers may give the facts under emphatic head lines the next day, but the party paper on the other side whose duty is to protect his party leaders against being damaged by the current news, will belittle the affair and distort the facts, even with the wounded constitution at its very feet.

Your honors, I must renew my motion that these proceedings be dismissed. Three days already the attention of these respondents has been taken away from their proper and legitimate legislative duties for which the State all the while was paying them; the day when the papers were served upon them and while they were endeavoring in much trepidation to ascertain what they all meant; one day while counsel were endeavoring but imperfectly to quiet their apprehensions of the threatened writs, whose very appellation was well calculated to excite their terrors; and one day now occupied in a vain search throughout the limits of judicial jurisdiction for the cases, said to be here, but which, so far as we can ascertain, are somewhere else in distant realms of space, precisely where, it seems impossible to tell.

The court held that under article four, section ten of the constitution, which provides, "Each house of the Legislature shall keep a journal of its proceedings and publish the same, except such parts as may require secrecy. Any member of either house may protest against any act, proceeding or resolution which he may deem injurious to any person or the public and have the reason of his dissent entered on the journal," a writ of *mandamus* would not lie to compel the president and secretary of the Senate or the speaker and clerk of the House to insert in the journals a protest which the Senate and House had refused to consider or receive.

Reported in 54 N. W. Rep., 887, 95 Mich., 314.

State of Michigan *vs.* The Estate of Charles B. M. Dunbar, an insane person.

Charles B. M. Dunbar was adjudged insane and committed to the Michigan Asylum for Insane March 19, 1869. He was subsequently transferred from the Michigan Asylum to the Northern Asylum, according to section 16, act 135, Public Acts of 1885.

Said Charles B. M. Dunbar is a nephew of one Elon Dunbar, who died in the city of Philadelphia, July 31, 1877, and said Charles B. M. Dunbar is a legatee under the will of said Elon Dunbar. Subsequently one James M. McBride was appointed guardian of the estate of the said Charles B. M. Dunbar, and the guardian received sufficient funds from the estate of Elon Dunbar for the use and benefit of said Charles B. M. Dunbar, to pay

any account that the State of Michigan might have against said Charles B. M. Dunbar, insane person.

During all the time that said Charles B. M. Dunbar was detained at the Michigan Asylum, and during the time that he was detained at the Northern Asylum, prior to April 1, 1892, he was supported by the State of Michigan; since April 1, 1892, he has been supported at private expense. Under section 32 of Act 135 of the Public Acts of 1885, it was claimed on behalf of the State that the estate of Dunbar was holden to the State of Michigan for the amount of money expended by the State since the passage of the act of 1885, and the Attorney General filed a claim in the probate court for the county of Delta against the said estate.

The guardian of the said estate contested the said claim on three grounds:

First, That Dunbar was not legally committed to said asylum;

Second, That the will under which Dunbar claimed title to his property so limited the use of it that it could not be used to pay a debt due the State;

Third, That the statute of limitations had run against at least a portion of the claims on the part of the State.

The case was heard in the probate court and the claim of the State was adjudged valid, and thereupon the estate appealed from the probate court to the circuit court, and in the circuit court the cause was heard on a stipulation of facts before Hon. John W. Stone, circuit court judge, without a jury, and the circuit judge found as follows:

THE CIRCUIT COURT FOR THE COUNTY OF DELTA.

The State of Michigan,
vs.
Bela M. Dunbar, an Insane Person.

This cause was heard by the court without a jury. No oral testimony was taken but the facts were stipulated and are matter of record. The stipulated facts in the case constitute the findings of fact by the court.

From the findings of fact I conclude as matter and conclusion of law that the plaintiff or claimant is entitled to recover upon the claim presented as follows:

For board and maintenance of said Bela M. Dunbar in insane asylums from June 3, 1885, to March 31, 1892, one thousand five hundred and thirty-seven dollars and seven cents ($1,537.07), with interest on the same at the rate of six per cent per annum from March 31, 1892, with costs to be taxed.

Some of my reasons for reaching the foregoing conclusion are the following:

Section 32 of act 135 of the Session Laws of 1885, being paragraph 1930 d–1, 3d Howell, provides that every insane person supported in the asylum shall be personally liable for his maintenance therein, and for all necessary expenses incurred by the institution in his behalf, and the guardian * * * * * shall be liable to pay the expense of his clothing and maintenance in the asylum, etc.

I think that under our statute the probate court of Delta county had jurisdiction over the matter and that the claim was a proper one to be allowed by that court in the estate.

Upon the question of the statute of limitations, it seems to me clear that the statute does not run against the State. Statutes of limitation will not operate against the State without express words declaring such to be the purpose.

Crane *vs.* Reeder 21 Mich., 24.

Except the statute otherwise expressly provides, it cannot be set up as a bar to any right or claim of the State. This rule applies to actions to recover debts due the State.

Wood on Limitation of Actions, 88-92.
13 Am. & Eng. Enc. of Law, 711, et seq.

The maxim, *nullum tempus occurrit regi* or *republicae*, only applies in favor of the sovereign power, and has no application to municipal corporations deriving their powers from the sovereign, although their powers in a limited sense are governmental. Thus the statute runs for or against counties or cities in the same manner it does for and against individuals.

Referring to the terms of the will of Elon Dunbar; after a careful examination of the same, I am unable to find that the testator ever contemplated that the money there disposed of, after it reached the hands of the legatee, should not be subject to the ordinary incidents of money or property. In the hands of the trustees it was to be free and clear of all claims against the legatee, and was to be received by the legatee free and clear of all such claims; but after it is held by him I see nothing to show that it was to be different from other property or money.

Therefore, I do not believe that the rule discussed at the hearing has application here. The expressed object of the limitation was to guard against improvidence. It was never intended, it seems to me, to prohibit the payment of a just claim for support, like the one under consideration here. If required to pass upon the question, I should hold the limitation could not be placed on money so as to bind parties, after it left the hands of a trustee. So long as the legal title remained in the trustee, the provisions would be binding, no doubt. A condition or proviso in a grant or devise to restrain or prohibit that operation of an attachment and levy of execution is void. Property cannot be granted or devised on the condition that it shall not be subject to the debts of the grantee or devisee.

As was said by Ruffin, C. J., in Mebane *vs.* Mebane, 4 Jud., (N. C.) Eq., 131: "Terms of the exclusion of the donee's creditors, not amounting to a limitation of the estate, can no more repel the creditors than a restraint upon alienation can tie the hands of the donee himself. Liability for debts ought to be, and is just as much an incident of the property as the *jus despondendi* is, for indeed, it is one of the modes of exercising the power of disposition."

See authorities cited in 13 Am. and Eng. Ency., 800.

I believe that any other rule, especially when applied to money, would be against public policy.

In Hallett *vs.* Thompson, 5 Paige, 586, the court says: "As a general rule it is contrary to sound public policy to permit a person to have the absolute and uncontrolled ownership of property for his own purposes, and be able at the same time to keep it from his honest creditors. It was an attempt to give the legatee an absolute uncontrolable interest in personal estate, and at the same time to prevent its being subject to the usual incidents of such an absolute right to property, so far as the rights

of creditors are concerned. This cannot be done consistently with public policy or the settled rules of law."

The only remaining question that I care to refer to is the absence of the record evidence of the adjudication of insanity and indigence.

Act 349 of the Session Laws of 1865, amending section 24, act 121, Laws of 1861, required the judge of probate to make the proper order in the journal or record of the probate court. It seems that this record was not made. This question has given me more trouble than any other in the case. I am inclined to believe that this statute was directory only. It seems to me that the validity of the adjudication cannot be made to depend upon the making of this record. The record, at best, is but evidence of the adjudication, and is not the adjudication itself.

Hickey *vs.* Hinsdale, 8 Mich., 267.
Blanchard *vs.* DeGraff, 66 Mich., 111.
Vol. 1 Freeman on Judgments, Sec. 87.

A statute requiring a public record to be made is merely directory, and if the record is not kept, the *fact* which is required to be recorded may be otherwise proved.

Kellar *vs.* Savage, 17 Me., 444.
Lick *vs.* Stockdale, 18 Col., 219.

Here we have the original certificate of the adjudication which accompanied Dunbar to the asylum. I think it contains enough of substance to show that a proper adjudication was made by the court, and it is the best evidence of the fact in existence. It is, I think, sufficient, in view of the stipulated facts. Upon the strength of this paper this man has been supported at public expense for more than twenty years; and because the records are defective, I do not think that the ends of public justice would be met by saying that there was no proper adjudication.

It has been held that the provisions requiring a judgment docket to be kept are merely directory in their character, and that omissions and variances which cannot work any prejudice are immaterial.

Sears *vs.* Burnham, 17 N. Y., 445.
Sheridan *vs.* Andrews, 49 N. Y., 478.
Whitney *vs.* Townsend, 67 N. Y., 40.

Let judgment be entered for the claimant as above indicated, with costs to be taxed."

An order was entered in conformity with the above opinion and afterwards the guardian appealed the case to the Supreme Court, where it is now pending.

Attorney General *vs.* The Michigan Mutual Benefit Association, of Hillsdale. Petition for the appointment of a receiver. F. H. Stone of Hillsdale appointed receiver.

The Imperial Life Insurance Company *vs.* State Treasurer. Application to compel respondent to deliver to relator certain securities. Denied.

The relator asked for an order under section 4227 of Howell's Statutes to compel the respondent to deliver to relator certain securities then on file in the office of the State Treasurer. These securities were deposited by

relator in accordance with the statute (Public Acts 1887, p. 33) which requires mutual insurance companies, before issuing any policies or assuming any risks, to deposit such securities with the State Treasurer, to be held by the Treasurer as security for policy holders in such company. Howell's Statutes section 4224. Section 4227 provides that the "securities so deposited with the State Treasurer shall remain in his hands, notwithstanding the company may cease or be prohibited to do business within the State, and shall only be withdrawn on the order of the Supreme Court, or when the officers of the company shall show by affidavit to the satisfaction of the Commissioner of Insurance and State Treasurer that the risks for which the company remains liable, and for the security of which the same are held, are less than the securities so deposited, in which case the company may be permitted to withdraw the surplus securities over and above the risks which then remain."

Held, That an order for withdrawal of securities to pay death losses of a company which has ceased to issue policies because its capital has become so impaired as to render it unprofitable and imprudent to continue business will not be made where, from the company's showing, its death claims and policies outstanding approximate the amount deposited, and the death claims may have been increased since such showing, and policy holders express a desire to be heard in opposition.

Reported in 55 N. W. Rep., 365, 95 Mich., 513.

Commissioner of Banking *vs.* The Central Michigan Savings Bank. Bill for appointment of receiver.

On May 4, 1893, the Commissioner of Banking, with the advice of the Attorney General, filed a bill of complaint in the Ingham county circuit court praying for the appointment of a receiver. On the 8th day of May, George W. Stone of Lansing was appointed receiver, and the affairs of the bank are now being closed up by him.

The People of the State of Michigan *vs.* The Mutual Reserve Live Stock Insurance Company of Marshall, Michigan. Proceeding for appointment of receiver. Receiver appointed.

Upon report being made by the Commissioner of Insurance, that the defendant was in an insolvent condition and not able to pay its policy holders, and after due consideration of such report, the Attorney General became satisfied that the interests of the State and the policy holders would be best subserved by the appointment of a receiver. Therefore, on April 21, 1893, a petition was filed praying that a receiver might be appointed. On May 2 a hearing was had and T. F. O'Leary of Marshall, Michigan, was appointed receiver.

Commissioner of Banking *vs.* The State Bank of Crystal Falls. Proceedings for appointment of receiver. Receiver appointed.

The bank in this case attempted to wind up its affairs through an assignee. Subsequently on application to the circuit court, Mr. H. S.

Brooks was appointed receiver and the affairs of the bank are now in process of settlement.

The showing of assets and liabilities at the time the receiver was appointed would indicate that all depositors would be paid in full.

William McPherson, Jr., *et al vs.* Secretary of State. Error to Supreme Court of Michigan. Affirmed.

Relators filed their petition in the Supreme Court of the State of Michigan on May 2, 1892, against the respondent, praying that the court declare Act No. 50 of the Public Acts of 1891, commonly known as the Miner Law, providing for the election of presidential electors by congressional districts, void and of no effect, and directing the respondent to act under the provisions of section 147 of Howell's Statutes. The petition was denied. (See McPherson *vs.* Blacker, 92 Mich., 377, Attorney General's Report 1892, page 46.)

A writ of error was afterwards allowed to the Supreme Court of the United States. Relators relied upon various grounds as invalidating the act referred to, and among them that the act was void because in conflict with clause two of section one of article two of the constitution of the United States, and with the fourteenth amendment of the constitution of the United States, and also that some of its provisions were in conflict with the act of Congress of February 3, 1887, fixing the day for meeting of presidential electors. It was claimed among other things on the part of the defendant in error that the decision of the Supreme Court of the State of Michigan was not reviewable by the Supreme Court of the United States as to that point. *Held*, that the validity of a State law providing for the appointment of presidential electors having been drawn in question by the highest tribunal of a state as repugnant to the laws and constitution of the United States, and that court having decided in favor of its validity, the Supreme Court of the United States has jurisdiction to review the judgment.

It was further held that under the second clause of article two of the constitution of the United States, the Legislature of the several states have exclusive power to direct the manner in which presidential electors shall be appointed, and that such appointment may be made by the Legislature directly, or by popular vote in districts, or by general ticket, as may be provided by the Legislature, and that the clause of the constitution referred to was not amended by the fourteenth and fifteenth amendments, and that they do not limit the power of appointment to the particular manner pursued at the time of the adoption of these amendments, nor do they secure to every male inhabitant of a state, being a citizen of the United States, the right, from the time of his majority, to vote for presidential electors.

The State law fixing a date for the meeting of electors differing from that prescribed by the act of Congress was held not to be thereby wholly invalidated, but the date might be rejected and the law stand, the United States statutes governing in such case. Reported in 146 U. S., 1.

John Elder and Robert Nixon *vs.* William A. Garner, Sheriff of Genesee County. *Mandamus.* Writ denied.

Relators, who were committed for trial upon a charge of murder, applied for the writ of *mandamus* to compel the respondent sheriff to bring them before a certain circuit court commissioner, to the end that they might be admitted to bail.

A circuit court commissioner has power to admit to bail a defendant committed for trial upon a charge of murder in the first degree, except in cases where the proof is evident or the presumption great. Howell's Statutes, section 9479. In this case the answer showed that the commissioner was by the respondent believed to be disqualified from acting in the premises, and that respondent had reasonable grounds for such belief; and inasmuch as no issue was asked to try the question, and there appearing to be another commissioner and the circuit judge, both residents of said county, by either of whom it could be presumed that said relators might be admitted to bail, the court left relators to such remedy, and refused to interfere by the discretionary writ of *mandamus.*

Reported in 55 N. W. Rep., 460.

In the matter of the investigation of charges preferred against Dennis Heffron, Sheriff of Schoolcraft county.

Charges were made against Dennis Heffron, Sheriff of Schoolcraft county, for neglect of duty, principally in connection with a house of prostitution in which Dan Heffron, a brother of the sheriff, was interested.

Charges were pending against the prosecuting attorney of Schoolcraft county at the time complaint was made against the sheriff. The prosecuting attorney indorsed the charges and recommended an investigation to be made in regard to the charges against the sheriff. The prosecuting attorney afterwards resigned, pending the charges against him. Thereupon the Governor directed the Attorney General to conduct the investigation concerning the charges against the sheriff.

The evidence relative to the charges was taken before Hon. Jerome Bowen, judge of probate of Schoolcraft county, at Manistique, the Attorney General appearing for the people and Hon. John Power for the respondent. A great amount of evidence was taken, and the judge of probate found substantially that the charges against the sheriff were true, and the case was submitted to Governor Winans; but the time being so short prior to the expiration of the term of office of the sheriff, the Governor deemed it wise to take no further action in the premises, hence, no decision was ever rendered.

Harry C. VanHusen *vs.* John A. Heames, Register of Deeds. *Mandamus.* Denied.

This was a case brought to test the validity of section 135 of Act 206 of the Public Acts of 1893. That section provides for a certificate from the county treasurer or from the Auditor General that there are no tax liens or titles, on the lands intended to be conveyed; that

registers of deeds shall not record any deed, land contract, etc., or other instrument for the conveyance of title to real estate, unless at the time the deed is offered for record the party shall also present a certificate from the Auditor General or from the county treasurer of the county as to whether there are any tax liens or titles held by the State or any individual against such piece or description of land, sought to be conveyed by such instrument, and that all taxes due thereon have been paid for the five years preceding the date of such instrument.

The court held the law valid and placed the following construction upon its provisions:

1. The certificate required need not set forth the liens or titles held by the State or individuals, but only the fact that liens or titles are held by the State, or individuals, or both. The existence of such liens or titles does not prevent the recording of the deed or plat, unless the lien held by the State is for taxes becoming due within five years previous to the date of the instrument.

2. If the certificate shows that all the taxes have not been paid for five years previous to the date of the deed or plat, it is not entitled to record.

3. If at the annual tax sales the land has been sold to individuals, this is a payment, so far as the State and municipalities are concerned, and a payment within the meaning of the act.

4. The act includes those taxes and those only, which, when not paid to the collector, are required by law to be returned to the county treasurer, and when not paid to him, are by him to be returned to the Auditor General. It does not contemplate that either of these officers shall make any examination outside the records of their own offices.

MANDAMUS AND OTHER PROCEEDINGS PENDING.

Auditor General *vs.* Bay County Treasurer.
State *vs.* Gilbert R. Osmun, *et al.*
State *vs.* Hulbert H. Warner, *et al.*
In the matter of the estate of Bela M. Dunbar, an insane person.

QUO WARRANTO PROCEEDINGS PENDING.

Attorney General *vs.* the Toledo, Ann Arbor & North Michigan Railway Company.

SCHEDULE D.

This schedule contains a list of all chancery cases commenced or completed between July 1, 1892, and July 1, 1893, and cases now pending in which the State is directly interested.

State of Michigan *vs.* The Flint and Pere Marquette Railroad Company, *et al.* Appeal from Ingham circuit court in chancery. Reversed.

This was an information filed by the Attorney General in the circuit court of Ingham county against the Flint & Pere Marquette railroad company and certain other parties, trustees, to quiet the title to certain lands, and to obtain an accounting for certain timber sold off from the lands claimed by the State of Michigan.

The case grew out of a dispute between the railroad company and the State relative to the rights of each in certain lands granted by the United States to the State of Michigan. The State claimed that the railway company appropriated fifteen thousand three hundred and seventy acres of lands granted to the State as swamp lands by the general government, by act of September 28, 1850.

The railway company denied this claim, alleging and claiming that the lands described in the information were not swamp lands, but lands granted by the general government by the act of June 3, 1856, to the State as trustee, and that they were afterward by the State granted to said railway company, and that the State was estopped from claiming any title to said land, for the reasons hereinafter stated.

The act of Congress of September 28, 1850, granted certain swamp lands to the State of Michigan. The act of Congress of June 3, 1856, granted certain alternate sections of the public lands to aid in the construction of certain railroads. By act No. 126 of the Public Acts of Michigan for 1857, the State accepted the grant and provided that on certain conditions the Flint & Pere Marquette railroad company should be entitled to certain alternate sections thereof, and should be exempt from taxation a certain number of years. *Held*, that where the company built its road and complied in all respects with the act of 1857 above referred to, and the State officials selected and certified the alternate sections to the department of the interior, which returned the certificates to be filed in the proper State department, and the State levied and collected taxes on the lands for fourteen years after the time of exemption expired, and failed to lay claim

to the lands for twenty-eight years, while the railroad company conveyed a large part thereof to innocent purchasers, the State was estopped from asserting title in itself to said lands.

Reported in 51 N. W. Rep., 103; 89 Mich., 481.

Alfred L. Millard *vs.* Jerome Truax and George W. Stone, Auditor General. Injunction bill. Decree for complainant.

This was a bill filed in the circuit court for the county of Ingham to restrain the Auditor General from issuing a tax deed to Jerome Truax. Truax bought the land for the taxes of 1887. The usual tax petition was filed by the Auditor General and the land of complainant advertised for sale. Complainant also had personal service of subpœna, but for some reason made no objection to the tax and allowed the sale to proceed. At the tax sale Truax, one of the defendants in this suit, purchased the land for the amount of the tax. Millard, the above named complainant, sold the land to another party, and in order to remove this cloud upon the title, he filed this bill, praying for an injunction, as above stated, and asking that the sale be declared null and void.

Among other things alleged in the bill was that the record of the tax sale did not show the interest in the lands sold, as required by the statute, and that there was never any report of the sale by the county treasurer to the county clerk, as required by law, and consequently no confirmation of the sale.

The Attorney General, on behalf of the Auditor General plead a former adjudication as a bar to the action. Messrs. S. B. Hutchinson and Professor Thompson on behalf of Truax filed a general demurrer. The court overruled the plea and demurrer on the ground that the bill filed in this case constituted a new and original suit, and the cloud upon complainant's title could be removed in no other manner, and that the sale could in this way be attacked collaterally, and ordered the defendants to answer.

On the hearing of the bill and answer, the court decided that the provisions of the statute (sections 53 and 62, tax law of 1889) requiring the county treasurer to enter in the proper column of the tax record the amount of the interest in the lands sold, were mandatory, and that a sale not in compliance with such statute was void, and that the Auditor General could be restrained from issuing a tax deed based thereon.

It was also said by the court that a confirmation of the sale would seem to be important, and he found, as a matter of fact, that no report had ever been made, such as was contemplated by the statute, hence, there was no confirmation.

A decree was entered in favor of the complainant, conditioned that he pay the taxes. This virtually sustained the position of the State and protected its interests, and therefore, it was deemed best not to join in the appeal which has been taken by the defendant Truax.

Auditor General *vs.* Charles H. Prescott. Appeal from Iosco county in chancery. Reversed.

This was an appeal from a decree made against the lands of the defendants on the petition of the Auditor General for a sale of the lands in the

county for taxes, levied in the year 1889, on lands owned by the defendants in Iosco county. The lands of the defendants were situated in the townships of Sherman, Alabaster, Reno, Grant, Tawas and Thompson. The evidence in the case showed that there was purposely omitted from the tax roll of the township of Oscoda about $800,000 worth of personal property, lumber, logs and salt, which property was taxable in that township, and also that the real estate of the last named township was assessed at one fourth of its cash value.

Held, that a decree for the sale of lands in other parts of the county for State and county taxes was erroneous.

Reported in 53 N. W. Rep., 1058, 94 Mich., 190.

Auditor General *vs.* Sarah Williams. Appeal from Isabella county in chancery. Affirmed.

The petition was filed in this case by the Auditor General, under section 52, act No. 195, Session Laws of 1889, praying for a decree in favor of the State of Michigan against certain lands in Isabella county for the taxes of 1889, among which lands are those of the defendant, being the S. W. ¼ of the S. E. ¼ of section 24, in township 15 N., range 4 W. The defendant, who is an Indian woman of the Chippewas of the Saginaw, Swan Creek, and Black River Indians, filed her objections to the tax, claiming that her land was not taxable, for the reason that it was patented to her on February 9, 1885, under and by virtue of the treaties of August 2, 1855, and October 18, 1864, between the United States and the Chippewas of Saginaw, Swan Creek, and Black River, in which she was denominated as a "not so competent," and which contained a clause that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being.

Act of Congress, June 15, 1836, providing for the admission of Michigan into the Union, required the State Legislature to provide by an irrevocable ordinance that said State should "never interfere with the primary dispositions of the soil by the United States, or with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers thereof, and that no tax should be imposed on land the property of the United States." July 25, 1836, the Michigan Legislature passed the ordinance required. By the treaty of October 18, 1864, made with the Saginaw, Swan Creek, and Black River Indians, it was provided that these Indians should be divided into those "competent" to prudently manage their own affairs and those "not so competent," and that patents for land allotted to the latter class should contain a clause forbidding alienation.

Held, that lands patented to Indians designated as "not so competent" could not be taxed by the State.

Reported in 53 N. W. Rep., 1097, 94 Mich., 180.

Auditor General *vs.* William Maier. Appeal from Saginaw county in chancery. Affirmed.

This was a bill by the Auditor General against William Maier to enforce the collection of a special city assessment. There was a decree in favor of the State, and defendant appealed.

Act 195 of the Public Acts, 1889, known as the "General Tax Law," provides (section 96) that the act shall be applicable to all cities, where not inconsistent with their respective charters. The Saginaw city charter, title 6, section 26, provides that special taxes shall become a lien on the premises, as other city taxes; payment thereof shall be enforced in the same manner as annual taxes, and for nonpayment thereof the premises shall be sold in the same manner as for the nonpayment of the other city taxes. *Held*, that both the charter and the general tax law contemplate and provide for the collection of taxes, special as well as general, by suit in the circuit court, at the instance of the State.

Title 5, section 10, of the charter requires that the provisions of the law respecting the return and sale of property for the nonpayment of taxes for State, county and township purposes shall apply to the return and sale of property for the nonpayment of city taxes. *Held*, that this authorizes the return of lands delinquent for nonpayment of all city taxes.

Held further, that the presumption is in favor of the validity of a special tax, and the burden is on the owner to show the contrary.

Title 6, section 7, of the above charter authorizes the common council, after the completion of the improvement, to issue a resolution reciting the improvement, the cost, the apportionment thereof among the parties interested, and the amount to be assessed on the lands benefited.

Held, that where it appears from the record that the lands alone were assessed for the benefits received, and that no personal assessments were made, the fact that some of those whose names appear on the roll as owners were not in fact owners is immaterial.

It appeared that defendant's lands consisted of two contiguous lots, which should have been assessed separately, but were not, but no objection thereto was made in his answer. *Held*, that defendant was precluded from raising the point on appeal.

Reported in 54 N. W. Rep., 640, 95 Mich., 127.

Auditor General *vs.* Louisa H. Smith. Appeal from Saginaw county in chancery. Affirmed.

Bill was filed by the Auditor General against Louisa H. Smith to enforce the collection of a street assessment. There was a decree in favor of petitioner, and defendant appealed. The solicitors of the respective parties stipulated that the suit should be governed by the final decision of a similar suit then pending in court, and that the time for moving for a rehearing in the present action be extended to ten days after the filing of the final decision in the other suit. After said decision had been filed, the State moved for a rehearing. Defendant objected because the decree entered under the stipulation provided that if the assessment was sustained the State should have the right hereafter to enforce the collection of the tax, and because the statute provided that, where no decree was rendered against any lands described in the petition, a new petition should be filed.

Held, that the stipulation must prevail, since its sole object was to enter a decree in accordance with the decree rendered in the case referred to in the stipulation.

Reported in 54 N. W. Rep., 641, 95 Mich., 132.

State Board of Inspectors *vs.* Zenas C. Jessops, *et al.* Bill in chancery to correct contract. Decree for complainant.

This was a bill filed by the Attorney General on behalf of the State Board of Inspectors to correct a certain optional contract for the purchase of lands owned by the State in the city of Jackson near the State Prison.

The contract was made between the old board and Zenas C. Jessops of Detroit. Jessops afterwards assigned his interest to Stephen H. Avery, who was at the time the contract was made, clerk of the board. At about the time of the assignment to Avery, he was engaged in forming what was afterwards known as the Jackson Stone Company, one of the above defendants, and subsequently became a director and member of the company.

It was claimed by the State that the contract, by mistake, improperly included a row of city lots lying south of a certain street called North street.

The records of the board relative to this matter described the land intended to be sold to Jessops as lying east of Cooper street and north of North street. Neither Jessops nor his assignees, Stephen H. Avery and the Jackson Stone Company, ever went into possession of that portion of land described in the contract as lying south of North street, and which, it was claimed by the State, was wrongfully included in the contract. On the contrary it had always been used by the prison authorities as a garden. Avery testified that at the time the original contract was made he understood it to include only those lands lying north of North street, and the circuit judge held that therefore as a matter of express contract Jessops assigned to Avery only that land lying north of North street, and although all of the incorporators of the Jackson Stone Company, except Avery, were as a matter of fact, ignorant of the mistake, and believed they were getting an interest in the row of lots south of North street, they were, as a corporation, held bound by the State of the case.

A decree was therefore rendered for the State, and the contract corrected so as to include only those lands lying east of Cooper street and north of North street.

LIST OF CHANCERY CASES PENDING.

Maria B. Pinckney *vs.* Commissioner of the State Land Office.
Auditor General *vs.* Arthur Hill.
State *vs.* Jackson, Lansing & Saginaw Railroad Company.
State *vs.* Flint & Pere Marquette Railroad Company.
State *vs.* Grand Rapids & Indiana Railroad Company.
Commissioner of Banking *vs.* The Ingham County Savings Bank.

SCHEDULE E.

This schedule contains a list of *quo warranto* and other proceedings, authorized by the Attorney General in the name of the State, but directed by and at the expense of the parties interested.

The People *ex rel.* Attorney General *vs.* Louis E. Howlett. Error to Livingston county.

Quo warranto on relation of the Attorney General against Louis E. Howlett. Judgment of ouster, and respondent brought error. Affirmed.

This was a proceeding by *quo warranto* to inquire into the right of the respondent to hold the office of county commissioner of schools for Livingston county. The cause was heard in the circuit court of that county, findings of fact and law made, and judgment of ouster entered. It appeared from the findings of fact that the respondent, at the time this proceeding was commenced, was exercising the duties of county commissioner of schools for Livingston county, under the provisions of Act No. 147, Public Acts 1891, by virtue of an election by the board of supervisors held June 24, 1891, and that he entered upon the duties of the office on the fourth Tuesday of August following. The sole question was upon the eligibility of the respondent.

In 1887 he graduated from the Howell Union School, receiving a graduating diploma, which entitled him to admission to various courses in the Michigan University without further examination. All branches of study required for a first grade certificate were included in his course at said Howell Union School.

He was also secretary of the board of school examiners of that county. He held, at the time of his election, a certificate issued by the board of school examiners of Washtenaw county, purporting to be a "special first-grade certificate;" but such certificate did not purport to be a regular first-grade certificate, nor was it issued or dated at any of the regular public examinations provided by law. After his election and prior to the commencement of his term of office, the board of county school examiners of Washtenaw county issued and delivered to him a teacher's first-grade certificate, in due form of law, and regular upon its face, signed by the secretary and chairman of such board. This bears the date of August 7, 1891; but the court found that the respondent was not present at the examination, though the board from personal acquaintance with him, were satisfied that in all respects he was qualified to hold such certificate; and that

such was issued in good faith, but not delivered to respondent until four weeks later. After the filing of the information in the case, the board of school examiners of Macomb county, on March 4, 1892, issued to him a teacher's first-grade certificate in due form of law. This was upon examination of the respondent at a regular meeting of the board, though he was not a resident of that county at the time, and not intending to teach in that county.

Under the circumstances the court held as follows:

1. A high school is not a "college" or "university," within the meaning of Act No. 147 of the Public Acts of 1891, which provides that graduates of such institutions shall be eligible to the office of county commissioner of schools.

2. Under said act making the holding of a first-grade certificate as teacher a qualification for the office of county school commissioner, such certificate issued to one after his election, though dated prior thereto, is insufficient.

3. The fact that one has been secretary of the board of examiners of another county does not qualify him to act as school commissioner.

4. A special first-grade certificate of qualification as teacher can be granted only at the regular public examination provided for by said act.

5. Where one disqualified under said act to act as county school commissioner is elected to that office, a judgment of ouster is proper, though there is no opposing claimant for the office.

Reported in 53 N. W. Rep., 1100, 94 Mich., 165.

Attorney General *ex rel.* John Seavitt, Jr. *vs.* Peter McQuade. *Quo warranto.*

There was an answer, replication, and rejoinder. Remanded for amendment of pleadings and trial.

This was a *quo warranto* proceeding to test the right of the respondent to hold the office of township clerk. The answer alleged that respondent and relator were opposing candidates for said office; that there were two election districts; that respondent received 340 votes, and the relator 331 votes, and that respondent was declared elected by the board of canvassers. The replication alleged that the election was valid in district No. 1, where relator received 260 votes and the respondent 201; that the returns of election in district No. 2 showed 139 votes for respondent and 71 for relator, and was invalid, because the chairman of the board fraudulently put into the ballot box 13 ballots of persons not registered, and 75 ballots of persons who had shown their ballots after they were marked, and for allowing third parties to enter the polling booths with the electors.

Held, that, if the averments of the replication are maintained by proof, the vote of the whole district must be rejected under Howell's Statutes, section 93, and Act No. 190, Laws of 1891, providing that no unregistered person has the right to vote, and when an elector votes he must enter the booth alone and prepare and cast his ballot without exposing it to others, since these provisions are mandatory.

Reported in 53 N. W. Rep., page 944, 94 Mich., 439.

Attorney General *vs.* Detroit Suburan Railway Company. *Quo warranto.* Leave to file information denied.

The Attorney General asked leave to file an information against the above named railway company for the reason that the company was exercising a franchise and privilege not conferred by law, in that the permit given by the township board was void upon its face, because it purported to grant an exclusive and perpetual right. The sole contention was that the privilege could not be granted to extend beyond thirty years. The road had been run for about seven years by the Highland Park Railway Company until February 1, 1893, when it transferred all its franchises to the respondent. No claim was made that either company was not duly organized, or that the road was not constructed in full compliance with the terms of the grant, or that either company had violated any of the conditions thereby imposed. No person living in the locality made any complaint, and the township made no objection.

Held, that the petitioner did not establish a case of such public interest as to justify the interference of the State.

Reported in 55 N. W. Rep., 562.

QUO WARRANTO PROCEEDINGS PENDING.

Attorney General *ex rel.* Henry M. Reynolds *vs.* William May.

Attorney General *vs.* Patrick Nester.

SCHEDULE F.

This schedule contains a list of all chancery cases commenced or determined between July 1, 1892, and July 1, 1893 or pending, in which some State officer has been made a party, and in which the State has some interest. These cases have been referred to the prosecuting attorneys of the various counties in which they are pending and left in their charge.

Julia H. Mills *vs.* Alonzo D. Sherwood, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Wallace B. Brooks, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Joseph Curran, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Alonzo D. Sherwood, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Auditor General, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Alonzo D. Sherwood, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Baltis Buss, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Thomas Nicol, *et al.* Bill in chancery in Sanilac county.

Julia H. Mills *vs.* Joseph Curran, *et al.* Bill in chancery in Sanilac county.

Wildman Mills *vs.* James Regan, *et al.* Bill in chancery in Sanilac county.

In the matter of the petition of William N. Merritt to set aside certain taxes of 1885.

Bostwick R. Noble, *et al. vs.* Sterling Nugent, *et al.* Bill in chancery in Huron county.

Charles Tripp *vs.* Auditor General, *et al.* Bill in chancery in Midland county.

Andrew J. Ersey *vs.* Auditor General, *et al.* Bill in chancery in Gratiot county.

SCHEDULE G.

This schedule contains a list of insurance companies whose articles of association, amendments and extensions thereto were approved by the Attorney General between July 1, 1892, and July 1, 1893.

Happy Home Club of America. Charter approved August 4, 1892.

Mutual Reserve Live Stock Insurance Company. Amendments approved August 8, 1892.

Farmers' Mutual Insurance Company of Ottawa and Allegan Counties. Revised charter approved August 22, 1892.

Farmers' Mutual Fire Insurance Company of Monroe and Wayne Counties. Extension of charter approved October 26, 1892.

Farmers' Mutual Fire Insurance Company of Branch County. Extension of charter approved October 27, 1892.

Livingston County Mutual Fire Insurance Company. Extension of charter approved December 14, 1892.

Farmers' Mutual Fire Insurance Company of Mecosta County. Revised charter approved January 21, 1893.

Three Rivers Farmers' Mutual Fire Insurance Company. Extension of charter approved January 23, 1893.

Farmers' Mutual Insurance Company of Kalamazoo County. Revised charter approved February 28, 1893.

Tuscola County Farmers' Mutual Fire Insurance Company. Revised charter approved February 28, 1893.

Farmers' Mutual Fire Insurance Company of Hillsdale County. Amendments approved February 28, 1893.

Citizens' Mutual Fire Insurance Company of Jackson. Charter approved March 15, 1893.

Genesee County Farmers' Mutual Fire Insurance Company. Revised charter and extension of charter approved March 20, 1893.

Farmers' Mutual Fire Insurance Company of Barry and Eaton Counties. Extension of charter approved March 29, 1893.

The Northwestern Accident Association of the United States. Amendments approved April 5, 1893.

Farmers' Mutual Fire Insurance Company of Ionia County. Extension of charter approved June 7, 1893.

Preferred Bankers' Life Insurance Company of Lansing, Michigan. Charter approved June 27, 1893.

Farmers' Mutual Fire Insurance Company, of Schoolcraft, Delta and Menominee Counties. Charter approved June 28, 1893.

SCHEDULE H.

Charged with.	Result.						
	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled or otherwise compromised.
Abduction	10	3	1		4	2	
Abortion	3	1			2		
Adultery	80	15	8	17	26	8	6
Aiding and abetting prize fight	1			1			
Aiding and abetting in keeping gaming room	5	2	2		1		
Aiding in concealing stolen property	1		1				
Aiding prisoners to escape	1			1			
Allowing stallions to run at large	1	1					
Arson	17	2	6		9		
Assault (simple)	71	45	14	5	5	2	
Assault (felonious)	15	8	2		4	1	
Assault and battery	3,157	2,052	599	197	242	61	6
Assault upon an officer	3	2			1		
Assault with intent to maim	2	1	1				
Assault with intent to do great bodily harm less than murder	129	57	33	5	30	2	2
Assault with intent to murder	68	21	17	2	28		
Assault with intent to commit robbery	10	2	5		3		
Assault with intent to commit rape	43	18	8		15	1	1
Attempt to break and enter store in night time	2	1			1		
Attempt to commit burglary	2	1	1				
Attempt to commit rape	3	3					
Attempt to commit murder	1					1	
Attempt to commit arson	1					1	
Attempt to defraud hotel keeper	3	1		2			
Attending theater on Sunday	1	1					
Bastardy	138	35	15	23	38	2	25
Being present at a prize fight	3	3					
Bigamy	13	9	2		2		
Blasphemy	13	11	1		1		
Breaking boat fastenings	1	1					
Breach of the peace	13	8		2		3	
Breaking and entering office, etc., in night time	4	2	2				
Breaking and entering office, etc., in day time	12	3	4		5		
Breaking and entering dwelling in night time	12	4	5		3		
Breaking and entering dwelling in day time	17	5	2	3	7		
Breaking and entering railroad car	76	64	7			5	
Breaking and entering store in night time	44	15	18	7	2		2
Breaking jail	2		2				
Breaking lock	1		1				
Bribery	2				1	1	

SCHEDULE H.—CONTINUED.

Charged with.	Result.						
	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled or otherwise compromised.
Burglary	166	119	12	5	21	6	3
Buying property of minors under sixteen	4	3		1			
Careless use of fire-arms	9	4	5				
Carnal knowledge of girl between fourteen and sixteen years of age	2	1	1				
Carrying concealed weapons	126	97	20	2	7		
Circulating counterfeit money	1				1		
Compounding felony	1		1				
Conspiracy	2		2				
Contempt of court	1	1					
Cruelty to animals	84	52	19	9	4		
Defrauding hotel keeper	71	45	7	9	7		3
Detaining females in house of ill-fame	2	2					
Disposing of chattel mortgaged property with intent to defraud	27	6	5	8	7	1	
Disposing of leased property	3	1		1			
Disturbing public meeting	14	13	1				
Disturbing public school	5	4		1			
Disturbing religious meeting	76	54	8		13	1	
Distributing obscene literature	2	1				1	
Disorderly classified as follows:							
(*a*) Common prostitutes	97	72	5	9	10		1
(*b*) Drunks	2,308	2,217	23	42	20	2	4
(*c*) Drunk and disorderly	543	433	41	52	17		
(*d*) Drunkards and tipplers	72	70	1	1			
(*e*) Gamesters and keepers of gaming r oms	78	56	9	10	3		
(*f*) Keepers of bawdy houses	41	29	2	5	5		
(*g*) Non-support of family	106	45	17	13	20		11
(*h*) Selling liquors to drunkards	1	1					
(*i*) Unclassified	4,272	4,019	103	106	26	18	
(*j*) Vagrants	1,281	1,148	59	43	31		
Dog fighting	3		3				
Drunk in public places	69	56	1	7	5		
Embezzlement	91	18	24	16	23	6	4
Entering vineyard	2	2					
Enticing female to enter house of ill-fame	3	2			1		
Enticing male child into secret place	1		1				
Escape by neglect of officer	2	1				1	
Exciting disturbance in grocery store	6	6					
Exhibiting obscene pictures	2	2					
Exposing poisonous substances	3		1		2		
False imprisonment	4	2				2	
False pretenses	109	30	20	13	30	15	1
Forfeited recognizance	2	2					
Forgery	65	41	7	3	11	2	1
Fraudulent removal of property in custody of the law	1		1				
Hunting on enclosed grounds	9	5	2	2			
Imitating trade mark	1	1					
Incest	5	1		1	3		
Indecent exposure of person	27	9	6		3	7	2
Indecent liberties with female child	3	1			2		
Indecent liberties with male child	1	1					
Jumping on moving train	20	18	1			1	
Juvenile disorderly	48	38	5	3		1	1
Keeping house of ill-fame	37	19	5	1	8	3	1

SCHEDULE H.—CONTINUED.

Charged with.	Result.						
	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled or otherwise compromised.
Keeping rendering establishment	1		1				
Kidnapping	3	2	1				
Larceny classified as follows:							
(a) From building in day time	24	16	2		5		1
(b) From dwelling house in day time	64	42	5	7	8	2	
(c) From the person	81	32	28	9	11	1	
(d) From railroad car	3	3					
(e) From store in day time	29	14	9	6			
(f) Of horse	7	4	1		2		
(g) Of less than twenty-five dollars	1,488	1,081	227	70	101	7	2
(h) Of more than twenty-five dollars	192	102	38	26	19	7	
(i) Unclassified	991	673	156	39	107		16
Leasing building for purposes of prostitution	3	2	1				
Leaving dead animals unburied	3	1		1			1
Lewd and lacivious cohabitation	14	2	3		6	1	2
Libel	8	2	5			1	
Malicious annoyance by letter	1	1					
Malicious injury to property	257	129	62	38	18	3	7
Malicious killing of animal	3		2			1	
Malicious maiming of animal	1				1		
Malicious mischief	7	6			1		
Malicious threats	58	30	18	1	6	2	1
Maintaining lottery	3		1		2		
Maintaining nuisance	17	7	6	2	2		
Manslaughter	15	8	4			3	
Mayhem	7	1	3		3		
Murder	34	22	8		4		
Neglect of duty by public officer	1			1			
Neglecting to advertise found property	3			1	2		
Neglecting to cut Canada thistles	1	1					
Obstructing railroad track	16	6	5	5			
Obtaining entrance to fair ground unlawfully	2	2					
Peddling without license	6	3	2		1		
Perjury	14		4		10		
Personating an officer	3	2	1				
Poisoning food	2		1			1	
Prize fighting	3	1		2			
Purchasing oleomargarine for use at Soldiers' Home	1						1
Rape	34	9	8	1	13		3
Receiving stolen property	27	8	8	3	6	1	1
Refusing to deliver up public records	1				1		
Refusing to destroy trees affected by yellows	1	1					
Refusing to serve colored people at restaurant	1		1				
Removing and concealing leased property	2	1	1				
Resisting an officer	25	11	1		12	1	
Robbery	32	15	9		6	2	
Search warrant	34	21	5		4		4
Seduction	23		8	6	13		1
Selling adulterated milk	2	2					
Selling diseased meat	1				1		
Selling pistols to boys	1	1					
Selling unwholesome provisions	1				1		
Sending obscene letter	1	1					
Slander	202	101	58	18	19	9	2
Sodomy	7	1	1		5		

SCHEDULE H.—CONCLUDED.

Charged with.	Result.						
	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled otherwise or compromised.
Soliciting and attempting to commit buggery	1	1					
Stealing ride on railroad train	16	15			1		
Subornation of perjury	2				2		
Surety to keep the peace	27	22	1		2	2	
Throwing missiles at railroad train	2	2					
Truancy	82	67	2	5	8		
Unhitching and driving away horse without consent of owner	21	16	5				
Unlawful practice of medicine	6	4		1	1		
Using fraudulent labels	1	1					
Violation of election law	7		3		3	1	
Violation of game law, classified as follows:							
(a) Killing deer out of season	7	3	4				
(b) Killing fish out of season	15	13			2		
(c) Killing quail out of season	2	1	1				
(d) Killing partridge out of season	1		1				
(e) Unclassified	51	34	6		9	1	1
Violation of health law	4		2	2			
Violation of liquor law, classified as follows:							
(a) Allowing minors to play billiards in bar-room	1	1					
(b) Bar obstructions	174	107	45	8	14		
(c) Keeping open on holidays	26	9	3		14		
(d) Keeping open on election day	2	1	1				
(e) Keeping open on Sunday	9	7	1	1			
(f) Keeping open after hours	69	29	7	10	22	1	
(g) Selling to minors	22	13	3	4	2		
(h) Selling without paying tax	293	143	22	23	105		
(i) Unlawful sales by druggists	8	3					
(j) Unclassified	362	166	68	61	71	1	
Violation local option law	81	28	5		8		
Violation of marriage law	1						1
Violation of oil inspection laws	4			4			
Violation of pharmacy law	4	4					
Violation of Sunday law	10	9	1				
Violation of steam vehicle law	1	1					
Violation of tax law	1		1				
Violation of tobacco law	4	3		1			
Willful trespass	51	20	13	7	11		
Total	18,974	14,230	2,060	989	1,372	205	118

SCHEDULE I.

County.	Prosecuting attorney.	Postoffice.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prossed.	No. discharged on examination.	No. settled or otherwise compromised.
Alcona	Osmond H. Smith	Harrisville	9	7	2	....	....	....	....
Alger	Henry B. Freeman	Au Train	7	6	1	....	....	....	....
Allegan	Fidus E. Fish	Allegan	139	99	9	7	20	....	4
Alpena	Lemuel G. Dafoe	Alpena	221	150	27	38	....	....	6
Antrim	Roswell Levitt	Bellaire	44	35	3	....	6	....	....
Arenac	Sanford C. Hayes	Standish	13	9	2	....	....	1	1
Baraga	Elmer E. Halsey	L'Anse	60	52	5	1	2	....	....
Barry	James A. Sweezey	Hastings	70	31	14	4	20	....	1
Bay	Lee E. Joslyn	Bay City	637	480	109	32	11	....	5
Benzie	Dwight G. F. Warner	Frankfort	25	10	5	6	4	....	....
Berrien	Nathaniel A. Hamilton	St. Joseph	252	185	52	2	13	....	....
Branch	William H. Compton	Coldwater	95	67	10	2	16	....	....
Calhoun	O. Scott Clark	Battle Creek	579	507	29	6	32	1	13
Cass	Charles E. Sweet	Dowagiac	240	217	7	7	9	....	....
Charlevoix	Frederick W. Mayne	Charlevoix	57	16	10	....	31	....	....
Cheboygan	Crawford S. Reilly	Cheboygan	64	40	8	6	10	....	....
Chippewa	John Hurst	Sault Ste. Marie	97	68	5	11	13	....	....
Clare	Henry K. Wickham	Harrison	41	28	7	....	5	1	....
Clinton	Wm. A. Norton	St. Johns	53	39	3	8	2	....	1
Crawford	Joseph Patterson	Grayling	28	23	2	3	....	....	....
Delta	Ira C. Jennings	Escanaba	139	116	12	7	4	....	....
Dickinson	Fabian J. Trudell	Iron Mountain	150	116	25	....	9	....	....
Eaton	Lyman H. McCall	Charlotte	361	296	4	7	53	....	1
Emmet	John G. Hill	Petoskey	23	12	8	....	3	....	....
Genesee	George F. Brown	Flint	171	121	19	....	10	13	8
Gladwin	Fern C. Smith	Gladwin	17	10	4	3	....	....	....
Gogebic	Charles M. Howell	Bessemer	462	384	40	15	17	3	2
Gd. Traverse	William H. Foster	Traverse City	126	86	2	9	20	3	6
Gratiot	William A. Leet	Ithaca	73	39	2	5	23	2	2
Hillsdale	Guy M. Chester	Hillsdale	122	88	5	10	4	15	....
Houghton	Albert T. Streeter	Calumet	187	160	16	5	6	....	....
Huron	John F. Murphy	Bad Axe	51	41	3	1	6	....	....
Ingham	Leonard B. Gardner	Lansing	767	583	45	7	23	73	36
Ionia	Royal A. Hawley	Ionia	795	711	38	17	29	....	....
Iosco	Main J. Connine	Oscoda	53	39	12	2	....	....	....
Iron	Michael H. Moriarity	Crystal Falls	90	50	13	....	26	....	1
Isabella	Herbert A. Sanford	Mt. Pleasant	74	38	5	7	22	2	....
Isle Royale			....	....	....	....	....	....	....
Jackson	Elmer Kirkby	Jackson	520	346	13	57	101	1	2
Kalamazoo	Alfred S. Frost	Kalamazoo	601	539	5	25	24	4	4

SCHEDULE I.—Concluded.

County.	Prosecuting attorney.	Postoffice.	No. prosecuted.	No. convicted.	No. acquitted.	No. dismissed on payment of costs.	No. nolle prosed.	No. discharged on examination.	No. settled or otherwise compromised.
Kalkaska	Cassius M. Phelps	Kalkaska	2	2					
Kent	Alfred Wolcott	Grand Rapids	600	350	84	74	66	26	
Keweenaw	Willard E. Gray	Lake Linden	2	1					1
Lake	Chas. D. Barghoorn	Luther	53	45	2	1	5		
Lapeer	Wm. E. Brown	Lapeer	116	85	10	4	17		
Leelanau	Alex McKercher	Leland	16	11	2	2			1
Lenawee	Frederick B. Wood	Adrian	403	352	3	7	41		
Livingston	Dennis Shields	Howell	35	22	9	3		1	
Luce	Sanford N. Dutcher	Newberry	12	6	3	1	2		
Mackinac	James J. Brown	St. Ignace	34	26	5		3		
Macomb	Oscar C. Lungershausen	Mt. Clemens	146	104	6	18	18		
Manistee	Thomas Smurthwaite	Manistee	345	292	13	22	16		2
Manitou†									
Marquette	H. Olin Young	Ishpeming	351	290	27	5	2	23	4
Mason	Mortimer L. Hudson	Ludington	97	74	4	7	9	2	1
Mecosta	Albert B. Cogger	Big Rapids	77	51	7	5	13	1	
Menominee‡	Benj. J. Brown	Menominee	139	104	5	6	10	12	2
Midland	Edmund P. Rice	Midland	43	22	2	4	13		2
Missaukee	Alva G. Smith	Lake City	24	19	2	2	1		
Monroe	Alonzo B. Bragdon	Monroe	76	35	14	18	9		
Montcalm	Bert Hayes	Stanton	115	62	13	6	25	9	
Montmorency	Fred J. Northway	Lewiston	21	14	2	1	1		3
Muskegon	Dan T. Chamberlin	Muskegon	208	106	49	26	24		3
Newaygo	George Luton	Newaygo	51	35	5	2	9		
Oakland	George W. Smith	Pontiac	411	388	6		17		
Oceana	Lewis M. Hartwick	Hart	39	26	4	1	3	5	
Ogemaw	Nelson Sharpe	West Branch	38	23			15		
Ontonagon	W. Worth Wendell	Ontonagon	17	9	3		5		
Osceola	Chas. H. Rose	Evart	37	28	3	1	5		
Oscoda	John A. McMahon	Mio	19	9	7		1		2
Otsego	Wm. A. Harrington	Gaylord	9	4	4		1		
Ottawa	Arend Visscher	Holland	208	182	8	11	6	1	
Presque Isle	George J. Moloney	Rogers City	20	11	9				
Roscommon	Henry H. Woodruff	Roscommon	33	17	4	9		3	
Saginaw	Eugene A. Snow	Saginaw	680	470	101	32	77		
Sanilac	Wm. A. Mills	Minden City	38	20	12	1	4		1
Schoolcraft	Virgil I. Hixon	Manistique	52	33	7	7	5		
Shiawassee	Frank H. Watson	Owosso	73	49	16	3	5		
St. Clair	Lincoln Avery	Port Huron	549	390	46	33	79		1
St. Joseph	David L. Akey	Centreville	69	38	15	6	10		
Tuscola	Theron W. Atwood	Caro	71	60	2		9		
Van Buren	Lincoln H. Titus	Paw Paw	94	69	8	3	11	1	2
Washtenaw	Thos. D. Kearney	Ann Arbor	348	297	8	30	13		
Wayne	Allan H. Frazer	Detroit	5,605	4,093	943	324	244	1	
Wexford	David A. Rice	Cadillac	85	62	15	3	4	1	
Total			18,974	14,230	2,060	989	1,372	205	118

* No prosecuting attorney.
‡ Last six months of year only.
† Reported by prosecuting attorney of Emmet county as no prosecutions.

SCHEDULE J.

OPINIONS OF THE ATTORNEY GENERAL.

Township clerk—Vote on appeal.

On appeal from the township board of school inspectors to the township board, the vote of the township clerk as a member of the town board would not be considered in determining whether the decision of the school inspectors should be affirmed.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing July 7, 1892.

JOHN HOLCOMB, ESQ., *Coral, Mich.:*

DEAR SIR—Your favor asking whether a township clerk would be authorized to vote, both as a member of the township board of school inspectors, and as a member of the township board, on appeal from a decision of the board of school inspectors, is received.

The township clerk is a member of the board of school inspectors, and as such would be entitled to vote; but on appeal, under the statute, it would make but little difference whether he voted or not, as the statute does not consider his vote in determining whether or not the decision of the board of school inspectors shall be confirmed. The statute provides (See chapter 9, section 3), "but the decision of said board or boards of school inspectors shall not be altered or reversed, unless a majority of such township board or boards, *not members of said board or boards of school inspectors* shall so determine."

You will see from the above that in passing upon the question of the formation of a new district, the vote of the township clerk would not be considered as he is a member of both boards.

Respectfully,
A. A. ELLIS,
Attorney General.

Employment of extra attorneys—Authority of board of managers of Soldier's Home.

Under Act 87 of the Public Acts of 1891, the board of managers of the Soldier's Home has no authority to employ private attorneys to conduct their litigation.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 19, 1892.

HON. L. W. SPRAGUE, *Treasurer of the Michigan Soldier's Home, Greenville, Mich.:*

DEAR SIR—Your favor asking my opinion as to whether or not you would be authorized to pay the claim of Judge Brown for appearance in the *mandamus* case of Joseph Loser, *et al. vs.* Board of Soldier's Home, before the Supreme Court, is received.

In reply I would say that there has never been any appropriation made by the Legislature to meet the claims of attorneys employed by the board of managers of the Michigan Soldiers' Home, and the board have no right to use money appropriated for other purposes to pay attorney fees.

The employment of attorneys by the several State departments and the boards of managers of the different institutions had been carried to such an extent, that the last Legislature attempted to put a stop to these proceedings by placing the hiring of attorneys in the hands of the Attorney General, by and with the consent of the Governor of the State.

Act No. 87 of the Public Acts of 1891, appropriates money for extra help, if any is necessary, but expressly provides that such sums shall be allowed by the Board of State Auditors, and the act provides that "no extra help shall be employed or paid, except on the recommendation of the Attorney General, with the written consent and approval of the Governor."

The matter of employing Judge Brown was not called to my attention, until the day prior to his appearance in the Supreme Court, and I then promptly decided that I could not request any such employment, neither could I approve the same.

Inasmuch as the State had had more important suits than the contest with the soldiers of the Soldiers' Home, and I had been able thus far to get along without employing extra help, I did not see any good reason to change the rule in that particular case.

I am, therefore of the opinion that the claim of Judge Brown is not a legal claim against the State of Michigan, and that you have no right to pay the same out of any moneys in your hands belonging to the Michigan Soldiers' Home.

Respectfully,
A. A. ELLIS,
Attorney General.

School meetings—Right of persons to vote.

Under section 24 of the General School Laws every person otherwise qualified who has property liable to assessment, although it is not assessed, is entitled to vote on all questions at a school meeting.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 20, 1892.

C. J. MCCORMICK, ESQ., *County Commissioner, Smith's Creek, Mich.:*

DEAR SIR—Your favor concerning the right of persons to vote, under section 24 of the General School Laws of 1889, is received.

The right to vote at a school meeting under that section, does not depend upon the fact that the property of the voter is *actually assessed*, but upon the fact that the person has "property *liable* to assessment for school taxes."

If a person is otherwise qualified, and has property liable to assessment for school purposes, such person would be a qualified voter.

The kind of property or its value, would not make any difference, provided it was liable to assessment for school purposes.

I am aware that great frauds may be practiced upon the tax payers of the district, by reason of persons voting who may have no legal right; yet, if these persons swear to their qualifications, I know of no way in which they can be legally prevented from voting. The law should be amended and more authority to decide such questions given to the board, or a certain amount fixed by the law as the minimum amount of property, or perhaps, to require the voter to show that he offered his property for assessment, at the time of the assessing of property for taxation.

But this matter of amendment is for the Legislature, not for us. As the law now is, these parties, who possibly may be committing a fraud on the tax payers, must be allowed to vote.

Respectfully,
A. A. ELLIS,
Attorney General.

Reorganized corporations—Franchise fee.

Under the act of May 23, 1889, corporations or associations for religious, charitable, benevolent or educational purposes, which are reorganized under said act, do not fall within the provisions of act 182, of the Public Acts of 1891, requiring a payment of a franchise fee to the Secretary of State by corporations thereafter organized, as said corporations are not new corporations.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, July 26, 1892.

HON. ROBERT R. BLACKER, *Secretary of State, Lansing, Mich.:*

DEAR SIR—In reply to your request, for my opinion whether the Hillsdale College should pay a franchise fee, by reason of renewing its corporate

existence, by virtue of an act entitled "An act to provide for the reorganization of corporations or associations for religious, charitable, benevolent or educational purposes, the corporate term of existence of which has heretofore expired or may hereafter expire by limitation, and to fix the duties and liabilities of such renewed corporations or associations," approved May 23, 1889, I would say:

The said act does not purport to organize new corporations, but to continue and reorganize old corporations. Section 2 of the act provides:

"The renewed term of such corporation or association shall begin from the expiration of the former term thereof, and the corporation or association thus *renewed* shall hold and own all of the property held and owned by *such corporation* or association *before its renewal*, and shall be liable to all its debts, liabilities and obligations, as fully as if its former corporate term had not expired."

It will thus be seen that the object is not to form a new corporation, but to continue the corporate existence of an old one, or to renew and continue its corporate life.

Mason *vs.* Perkins, 73 Mich., 303. 316.

Act No. 182, of the Public Acts of 1891, only has reference to corporations thereafter organized. The Supreme Court of this State, so far as act No. 182, of the Public Acts of 1891, has been before it, has given it a strict construction, and has limited its operation within the plain language of the act.

The renewal of corporations does not come within the language of the act, and I am, therefore, of the opinion that you have no legal right to exact a franchise fee from the Hillsdale College on filing its renewed articles of association.

Respectfully,
A. A. ELLIS,
Attorney General.

Election expenses—County charge.

The expense of furnishing cuts of vignettes, tickets, stamps, ink pads, etc., is an expense to be paid by the county.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 1, 1892.

HON. JOHN MAXWELL, *Judge of Probate, Mt. Pleasant, Mich.:*

DEAR SIR—Your favor asking whether or not the expense of furnishing ballots and stamps is to be a county charge, under section 9, of act No. 190, of the Public Acts of 1891, is received and considered.

The expense of furnishing copies of the number of cuts of the several

vignettes, is provided for by the latter part of section 12, and the expense of furnishing the tickets, stamps, ink pads, etc., is covered by section 17. The entire expense is an expense to be paid by the county.

Respectfully,
A. A. ELLIS,
Attorney General.

Agricultural College lands—Increase in price of.

There is no statute that gives the Commissioner of the State Land Office any authority to advance the price of Agricultural College lands, as re-appraised and re-fixed by the board appointed for that purpose.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 5, 1892.

HON. GEO. T. SHAFFER, *Commissioner of the State Land Office, Lansing, Mich.:*

DEAR SIR—Your favor notifying me that the State Board of Agriculture requested you to increase the price of the Agricultural College lands, before offering them for sale, and asking whether, under the law, you would have the authority to advance the price of such lands, is received.

These lands were originally to be sold for not less than three nor more than five dollars per acre. Subsequently, by act of the Legislature, the lands were to have been examined by a board, consisting of the Governor, State Treasurer and Commissioner of the State Land Office to re-appraise the lands. Since that time the lands have been re-appraised and the value re-fixed.

There is no statute that gives the Commissioner of the State Land Office any authority whatever, to advance the price of these lands, and there is no authority in the law for you to grant the request to advance the price of all of these lands as requested by the board.

In this I do not mean to hold that you are obliged to sell any State lands for the minimum price fixed, provided you have good reason to believe, and do believe that the particular piece of land is worth more money. But such a question as that must be settled from time to time as the question may arise relative to the value of any particular piece; and the fact that you have this power does not vest you with any power whatever, to grant the request of the State Board of Agriculture.

I therefore give it as my opinion that it is your duty to notify said board that under the statute, you have no authority to grant their request.

Respectfully,
A. A. ELLIS,
Attorney General.

State tax lands—Deeds for—By whom issued.

Under sections 73 to 78 inclusive of the tax law of 1891, the county treasurer is the only officer authorized to issue deeds for State tax lands sold either at public or private sale.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 9, 1892.

HON. GEORGE W. Stone, *Auditor General, Lansing, Mich.:*

DEAR SIR—In reply to your request for my opinion as to who should issue the deeds for State tax lands, sold at public auction under section 76a, of act No. 200, of the Public Acts of 1891, I would say:

It is my opinion that it is the duty of the county treasurer to issue all deeds for State tax lands sold either at public or private sale.

The reason for my opinion is this:

I believe that sections 73 to 78 inclusive, should be considered and read together, as relating to the State tax lands.

Section 73 provides that the Auditor General shall furnish to each county treasurer in the month of February a list of such land in each year, prior to the time the lands are to be sold.

Section 74, that the county treasurer shall use the list thus furnished, together with the list of the same kind of lands in his office, and from that he shall make out a "complete list."

Section 75, that "the county treasurer shall cause to be published for four weeks successively * * next previous to the first Monday of May, * * a notice that the lands described in such statement will be sold by him at public auction *at the time and place designated for the regular tax sales.*"

Section 76, that "at the time and place designated in the notice, the county treasurer shall proceed to sell *said lands last mentioned.*"

The lands last mentioned are the State tax lands, and hence section 76a must relate to these lands.

The next section provides what a person shall do who buys State tax lands, when they are also offered for delinquent taxes; and provides that a party who bids for lands on the State tax land list shall also be required to purchase from the delinquent list.

Section 77 provides for the issuing of a certificate of sale to the purchaser.

Section 78: "After the period of redemption provided for in this act shall have expired, the county treasurer, on presentation and surrender of such certificate, *shall issue to the purchaser*, his heirs or assigns, a deed of conveyance, etc."

It will be noticed that section 76b provides for two bids at the same sale, one from the State tax land list, and one from the delinquent list. There is a period of redemption from the latter bid.

The clause in section 78, "After the period of redemption provided for in this act shall have expired," so far as the State tax lands are concerned, might have been entirely omitted, and probably would have been had it not been preceded by the section relating to the condition where a party might be entitled to a deed at once, and the other only after the period of redemption had expired. But the fact that a period of redemption is

spoken of, when there is none, could have no legal effect. It is mere surplusage, as it clearly appears that it was the intention of the law that the deed of sale, in either case covered by section seventy-eight, was to be given by the county treasurer.

My conclusion is not only based upon the sections already quoted, but further upon the conclusion reached by a careful reading of section 111 of the act, which expressly repeals act No. 195, of the Laws of 1889, except as to lands which have been returned and never offered for sale.

The repeal of act No. 195 would take away all the authority that the Auditor General had for making deeds for State tax lands.

Again, sections 62, 63, 64 and 65 of said act No. 200, provide for the sale and deeding of lands sold for delinquent taxes; hence, the clause in section 78, which provides that on the return of the certificate, the county treasurer "shall issue to the purchaser, his heirs or assigns, a deed of conveyance," cannot relate to anything except State tax lands, and other lands bid off both as State tax lands, and delinquent lands at the same sale.

If the lands are of the class which are covered by section 111, the county treasurer would give the deed for the bid for the State's interest on the State tax land list, and the Auditor General, under the exception in section 111, would, if the lands were not redeemed, give the deed for the bid on the delinquent list under act 195, of the Public Acts of 1889; but the fact that the right is reserved to the Auditor General to sell certain specified lands under section 111, does not give him any authority to deed lands sold as State tax lands from the State tax land list.

Respectfully submitted,

A. A. ELLIS,
Attorney General.

Re-apportionment—Boards of supervisors—Special sessions.

Under the constitution and laws of this State, the board of supervisors has a legal right to re-district the county at either an annual or a special session of the board, when such county is entitled under the law to two or more representatives, and no legal re-districting has been had.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE.
Lansing, August 10, 1892.

HON. JAS. MCMILLAN, *Chairman of the Republican State Central Committee, Detroit, Mich.:*

DEAR SIR—Your favor asking my opinion as to whether special sessions of the several boards of supervisors should be called for the purpose of re-districting those counties which under the act of August 6, 1892, are entitled to two or more representatives, is received.

Article 4, section 4, of the constitution, provides that the Legislature shall at the first session after each enumeration, rearrange the senate districts, and apportion anew the representatives among the counties and districts, etc.

Section 3, article 4, among other things provides, "In every county entitled to more than one representative, the board of supervisors shall assemble at such time and place as the Legislature shall prescribe, and divide the same into representative districts, equal to the number of representatives to which such county is entitled by law, and shall cause to be filed in the offices of the Secretary of State and clerk of such county, a description of such representative districts, specifying the number of each district and population thereof, according to the last preceding enumeration."

Section 485 of Howell's Statutes provides that the board of supervisors in each county, entitled to more than one representative in the State Legislature, shall, at their annual meeting next after each apportionment of representatives by the Legislature, divide their respective counties into representative districts, etc.

It will be observed that the constitution provides that the apportionment by the Legislature shall be made at the first session after each enumeration, and that the statute provides that the division by the supervisors shall be "at their annual meeting next after each subsequent apportionment."

The constitutions of Wisconsin and New York, so far as they relate to the time of making the apportionment, provide the same as the Michigan constitution, that the same shall be made "at the first session, after the enumeration," and the Supreme Court of each of those states has held that the limitation, so far as time is concerned, is directory.

In discussing that question, the court of Wisconsin said: "The plain intent of this provision is to enable a new apportionment to be made at the earliest practicable period after the enumeration, to the end that the change in the representation thereby required shall readily become effective, and not be unreasonably delayed, * * * and it seems plain, both upon principle and precedent, that no objection exists to the passage of a valid act of apportionment at a special session.

State *vs.* Cunningham, 51 N. W. Rep., 740.
Rumsey *vs.* People, 19 N. Y., 41.

Inasmuch as the clause in the constitution as to time has been construed to be directory merely, the similar clause in section 485 of Howell's Statutes would, upon the same principle, be subject to the same construction; and hence, I conclude that the board of supervisors have a legal right to re-district the county at either an annual or special session of the board.

Most of the boards of supervisors of the several counties of the State, since the last enumeration, and after the passage of the law of 1891, have re-districted the counties entitled to two or more representatives. The re-districting took place after the enumeration, and after it was substantially known what representation each county would be entitled to; yet it could not be positively known, as the change in the distribution to some of the smaller counties, among the different districts, might add another representative to a county having the largest moiety, and hence I am not prepared to hold that the action of the board of supervisors taken after the enumeration, and prior to the passage of the act of 1892, would be binding upon the board itself, if the board, either at a special or regular session, saw fit to re-district the county; yet I have no doubt that if the re-districting has been done according to the population, and the board of

supervisors see fit to leave the districts on the apportionment already made, that their action would not be disturbed by the court. The court would not command a useless thing to be done.

In order however that there might be no misunderstanding or uncertainty about the matter, it is my opinion that all counties where the boards of supervisors are not satisfied with the present districts, should meet in special session and re-district the county. In all cases where they are satisfied with the districts already made, they should at the annual session in October, pass a resolution affirming their previous action, and directing the clerk to notify the Secretary of State that the form of the districts and the population as given by their previous notice has been declared to be the legal division of the county.

Where there is no action by the board of supervisors prior to the October session, it will be assumed by the Secretary of State that the districts, as made since the last enumeration, are the legal districts of the county, and notices will be given accordingly.

The Supreme Court of this State has several times held that where an officer was to be elected at a general election, the fact that no notice was given, would not vitiate the election. But no question of this kind will arise, as notice will be given by the Secretary of State.

To call together the boards of supervisors of those counties where there is to be no change whatever, would only entail an unnecessary expense; and hence, it seems to me that the course above indicated is all that is required under the circumstances.

Respectfully,
A. A. ELLIS,
Attorney General.

Hawkers and peddlers—Include what.

A person who sells goods in a fixed place is not a hawker and peddler within the meaning of sections 1257 to 1263 of Howell's Statutes, and cannot be required to pay a license as a hawker and peddler.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 20, 1892.

JOHN A. COMBS, ESQ., *Attorney, etc., Saginaw, E. S., Mich.:*

DEAR SIR—Your favor stating that a wholesale firm in Saginaw selects a certain dealer in another city, and asks his permission to place its goods in his store for two or three days; the wholesale firm sends a man to sell the goods and allows the retail merchant five per cent on the gross sales for the use of the store; the advertising is done ten days before the sale through hand-bills and local papers, in the name of the retail merchant, and at his expense, and requesting my opinion as to whether such firm is a hawker and peddler within the meaning of sections 1257–1263 of Howell's Statutes, is received and considered.

The sale is had at one place. There is no going from place to place, or from house to house; but the goods are sold in the store the same as any other goods.

The primary idea of a hawker and peddler is that of an itinerant or traveling trader, who carries goods about for sale, and actually sells, in contradistinction to a trader who sells goods in a fixed place of business.

Commonwealth *vs.* Tarmun, 114 Mass., 270.
Morrell *vs.* State, 38 Wis., 437.

The above definition does not include one who does business only at one place, as such an one could not be classed as "a hawker and peddler" within the meaning of the statute, and consequently he would not be liable to pay a license as a hawker and peddler.

Respectfully,
A. A. ELLIS,
Attorney General.

Publication of laws in foreign languages—What is deemed a law—Concurrent resolutions.

Under section 35, of article 4, of the constitution, the concurrent resolutions passed by the special session of the Legislature of 1892 should not be published in connection with and as a part of the laws to entitle publishers of newspapers to payment, as provided by section 27 of Howell's Statutes.

Newspapers which publish the general laws of any session of the Legislature in a foreign language, or in any other than the English language, are entitled to payment under section 27 of Howell's Statutes, and section 6 of article 18, of the constitution.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 22, 1892.

HON. H. R. PRATT, *Deputy Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor received, asking for my opinion:

First, As to whether or not the concurrent resolutions, or either of them, passed at the special session of the Legislature in 1892, should be published in connection with, and as a part of the laws, to entitle publishers of newspapers to payment as provided by section 27 of Howell's Statutes, and the constitutional provision on which the same is founded; and

Second, As to whether papers, if any there should be, that make the publication in a foreign language, or any other than the English language, are entitled to payment under the section referred to.

In reply to your first interrogatory:

The real question involved is, what is included, under section 35 of article 4, of the constitution, as "general laws."

That section provides that, "Every newspaper in the State which shall publish all the general laws of any session, within forty days of their passage, shall be entitled to receive a sum not exceeding fifteen dollars therefor."

If the concurrent resolutions passed by the last Legislature come within the definition of "general laws," then they should be published. If, on the other hand, they do not come within the definition of "general laws," the State Treasurer would not have the right to demand their publication in

order to entitle one who had published the general laws to require payment.

The same article, article 4, section 20, provides that, "No law shall embrace more than one object, which shall be expressed in its title."

The concurrent resolutions to which you refer have no title whatever, and hence do not come within the definition of a law, as contemplated by section 20.

Section 19, article 4, provides, "On the final passage of all bills, the vote shall be by yeas and nays, and entered on the journal."

The first concurrent resolution to which you refer, in relation to highways, was voted on in the House *viva voce*, and the yeas and nays were not entered on the journal, neither do the journals of either house show that it was passed with that formality which is required in the passage of a general law.

The concurrent resolution relative to maps was not signed by the Governor, and even though it contained all of the other formalities concerning its passage, etc., still it cannot in any sense be considered as a general law.

In legislative practice the term "resolution" is usually employed to denote the adoption of a motion, the subject matter of which would not properly constitute a statute, a mere expression of opinion, or choice.

Under the circumstances, as they are presented in this case, I am clearly of the opinion that the concurrent resolutions to which you refer would not be embraced within the language of "general laws" as used in section 27 of Howell's Statutes, and in section 35, of article 4, of the constitution of this State; and that, therefore, it would not be necessary for newspapers to publish these concurrent resolutions in order to be entitled to their pay under section 27 of Howell's Statutes.

Your second interrogatory is suggested by reason of the language of section 6, of article 18, of the constitution, which provides: "The laws, public records, and the written, judicial and legislative proceedings of the State shall be conducted, promulgated, and preserved in the English language," and the question is, do the words "promulgated * * * in the English language" in this section so limit and control section 35, of article 4, of the constitution, and section 27 of Howell's Statutes, that, in order to be entitled to the fee for publishing the general laws, they should be published in the English language.

The object of publishing the general laws of the State is that all of the people may be notified, at as early a date as possible, of the statutory law of the State.

Section 85, of article 4, is general in its terms, "Every newspaper in the State which shall publish all the general laws," and section 27 of Howell's Statutes is also general, "That the State Treasurer be and he is hereby required to pay on the warrant of the Auditor General, fifteen dollars to every publisher of a newspaper, in this State, who has heretofore, or may thereafter, publish all the general laws passed at any session of the Legislature, on satisfactory proof to the Auditor General of such publication, as authorized by the constitution."

It will be observed that the language of the statute applies to every publisher of a newspaper. The only limiting clause, if any, in the section is the latter clause, "as authorized by the constitution." If that latter clause should be construed to refer to article 18, section 6, it would then be limited by the words "English language."

If, on the other hand, it refers only to article 4, section 35, it would apply to all papers indiscriminately.

It will be observed that the language used in article 4, section 35, is "published," while the only word used in article 18, section 6, that could possibly have any reference to this matter is the word "promulgated."

The words "promulgate" and "publish" do not necessarily mean the same thing. Bouvier, in his Law Dictionary, says: "Promulgation is the order given to cause a law to be executed, and to make it public. It differs from publication." He cites, I Blk. Com. 42; Stat. 6, Henry VI, Chap. 4.

There is no doubt that the language of the constitution is intended to apply to the publishing of the laws; but I am of the opinion that in article 18, section 6, the "promulgation" referred to is the official printing of the laws for preservation and distribution, and does not relate to the printing of the laws in newspapers for the purpose of informing the public at large of the general laws passed by the Legislature.

The constitution and section 27, relative to publishing the laws in newspapers, in terms, include all newspapers, and it must have been known that there was and would be newspapers published in every language. There would be no sense in publishing an English copy of the laws in a German, or any other paper published in a foreign language; and it is for the interest of the public at large that every citizen, whether he read English or not, should be acquainted with the laws of the State.

The most that could be said of section 6, article 18, would be that the laws should be promulgated in a certain way. It certainly does not attempt to limit the right of the Legislature to further provide that the laws shall also be published in newspapers printed in other languages.

Reading the provisions of the constitution in the light of the reason for the public printing of the laws, and fully believing that the spirit of the constitution and the statute would be enforced by a construction that will give every citizen of this State, whether he can read the English language or not, an equal opportunity to know the law, I am of the opinion that any newspaper publishing the general laws of the last session of the Legislature, in either English or a foreign language, is entitled to payment under section 27 of Howell's Statutes.

Respectfully,
A. A. ELLIS,
Attorney General.

Authority of county treasurer to collect delinquent taxes on homestead and part paid State tax lands.

The several county treasurers of this State have authority, and it is their duty, to receive statements of all homestead and part paid State tax lands which are returned to them by the township treasurer as delinquent, and the fee of which is in the State, during any time previous to making his return to the Commissioner of the State Land Office.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 24, 1892.

HON. GEO. T. SHAFFER, *Commissioner of the State Land Office, Lansing, Mich.:*

DEAR SIR—Your favor requesting my opinion as to whether the county treasurers of this State have authority to collect delinquent taxes on part

paid lands which are returned to them by the township treasurers, is received and considered.

Section 46 of act No. 200, of the Public Acts of 1891, provides for the return of all unpaid taxes to the county treasurer by the several township treasurers.

Section 47 provides, "After the return of lands for unpaid taxes the county treasurer is authorized to receive the amounts of the several taxes or any of them due * * *"

By section 91 of the same act the county treasurer is required, "on or before the first day of May of each year to make a return to the Commissioner of the State Land Office of all homestead and part paid State tax lands, the fee of which is in the State, * * * The person holding such interest in any parcel of land shall, on or before the fifteenth day of July following such return, pay to the State Treasurer the taxes assessed thereon, with interest at the rate of one per cent per month from the first day of February last preceding, * * *"

The law authorizes the county treasurer to collect the taxes on all lands returned to him as delinquent by the township treasurers, and makes no exception of homestead and part paid State tax lands, the fee of which is in the State.

Furthermore, if the law is to be construed as making the Commissioner of the State Land Office the only proper officer to receive such taxes after their being returned delinquent by the township treasurers, it might work a great injustice to persons interested in such lands.

The county treasurer is not required to make his return until the first day of May; hence, during the months of February, March, and April, a person desirous of paying his taxes might be prevented from so doing, as there would be no officer who could receive them.

Such I do not think was the intention of the Legislature, and it seems to me that section 46 above referred to gives ample authority to county treasurers to receive any taxes returned to them as delinquent, whether on part paid State tax lands, or lands of other descriptions.

It is my opinion, therefore, that it is the duty of the county treasurer to receive payments of all homestead and part paid State tax lands, the fee of which is in the State, during any time previous to making his return to the Commissioner of the State Land Office.

Respectfully,
A. A. ELLIS,
Attorney General.

Compensation of circuit judges—Extra services—Liability of State—Expenses.

Under the constitution and laws of this State a circuit judge is not entitled to *per diem* compensation for services rendered in some judicial circuit other than his own, when he is so requested by the Governor. His expenses, however, may be legally allowed by the Board of State Auditors.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, August 24, 1892.

To the Honorable, the Board of State Auditors, Lansing, Mich.:

GENTLEMEN—You request my opinion as to whether Judge J. B. Judkins, circuit judge of the nineteenth judicial circuit, who was requested

by the Governor of this State, under and by virtue of section 6462 of Howell's Statutes, to hold a term of court in the twentieth judicial circuit, is entitled to *per diem* compensation for services rendered in compliance with said order.

Under the constitution and laws of this State (section 11 of article 6 of the constitution, and 6462 of Howell's Statutes) a circuit judge can be required to sit in any other circuit and perform the duties of another circuit judge.

By section 1 of article 9 of the constitution they are to receive an annual salary of $2,500. In the same section it is provided, "They shall receive no fees or perquisites whatever for the performance of any duties connected with their offices."

As was said in the case of Royce *vs.* Goodwin, 22 Mich., 499, the judicial department of this State "cannot in any of its duties be said to serve any county or circuit or district. Its services are all performed on behalf of the State as the sovereignty from which all the law emanates."

In the case of People *vs.* Auditor General, 5 Mich., 193, the court held that the salary of the circuit judge, as fixed by article 9 of the constitution, was not payable for the performance of one class of duties only, but was a remuneration for all of the duties attached to the office.

In discussing the question, Judge Campbell used this language:

"Is, then, the salary payable for the performance of one class of duties, or is it a remuneration for all? As before remarked it is payable by the State among the salaries of State officers * * * The salary is not given for one thing or for another. It is given to the Governor, to the Auditor, to the judge; and it must be understood, as it is plainly expressed, to be the salary for such duties as are imposed upon them officially by the constitution. The same instrument creating the office, the duties, and the emoluments, they must all be held as belonging together, and constituting a complete guide to the whole matter."

See text, p. 201.

As, under the constitution, as construed by the decision of the court, the salary of the circuit judge was intended as a compensation for all services rendered in his own and other circuits, the charge for compensation cannot be legally allowed.

What I have said only applies to *per diem* compensation for services, and not the expenses of the judge, incurred by reason of the order of the Governor in requiring him to perform duties in another circuit. I know of no reason why the account for expenses should not, under the constitution, be paid.

Respectfully,
A. A. ELLIS,
Attorney General.

Publication of tax lists—"Established paper."

A paper in general circulation, and which is established in the county as early as April 29, 1892, fully meets the requirements of section 70 of act 195 of the Public Acts of 1889.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, September 2, 1892.

HON. GEORGE W. STONE, *Auditor General, Lansing, Mich.:*

DEAR SIR—In reply to your request for my opinion concerning the application of the Oscoda County Democrat for the State printing, I would say:

I have examined the affidavits of the chairman of the board of supervisors and the editor of the paper and the copy of the paper furnished, and from all of these it clearly appears that said paper was established in the county of Oscoda as early as April 29, 1892.

The law provides (section 70 of act 195 of the Public Acts of 1889) that "the notice shall be published in some newspaper of the county where the lands are situated, if there be any such paper in general circulation, and which was established two months at least before the first day of July preceding the publication."

The paper in question is one in general circulation, and under the showing, was established more than two months before the first day of July last.

I am therefore of the opinion that publication of the tax record, etc., in the Oscoda County Democrat, would be legal and fully authorized by the statute.

Respectfully,
A. A. ELLIS,
Attorney General.

School law—Eligibility to office of moderator—De facto officers—Quo warranto proceedings.

Under section 31 of the General School Laws of 1889, a person who possesses no property in a district of which he is a resident, liable to assessment, is not eligible to election or appointment to the office of moderator.

An officer who enters upon the duties of his office is a *de facto* officer, and his acts are binding upon the public. The only remedy to test his right to hold office is by *quo warranto* proceedings.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, September 8. 1892.

J. F. CULLEN, ESQ., *Wayne, Mich.*:

DEAR SIR—Your favor asking my opinion as to "whether a person can hold the office of moderator in a school district under the following circumstances, to wit, he is a resident of the district, but the property occupied by him was in his wife's name at the time of his election. After

his election and before qualifying, his wife deeded him the land, and he has had such deed recorded" is received and considered.

Section 31 of the General School Laws provides, "Any qualified voter in the school district, who has property liable to assessment for school taxes, shall be eligible to election or appointment to office in such school district, unless such person be an alien."

You will observe by the reading of the statute that he is not only ineligible to the office of moderator if he does not possess property in the school district liable to assessment, but he is ineligible to an election for the office of moderator. There can be but one interpretation of this statute. A person who possesses no property in a district of which he is a resident, liable to assessment, is certainly not eligible to election or appointment to any of the school district offices.

Under your statement of facts, if the person elected moderator possessed no property other than that deeded him by his wife, then in such case he was ineligible at the time of his election, and a subsequent deeding of the property to him by his wife, would not remove the disability.

If, however, the officer entered upon the duties of his office, he would at least be a *de facto* officer, and his acts would be binding upon the district. The only remedy to test his right to hold the office would be by *quo warranto* proceedings.

Respectfully yours,
A. A. ELLIS,
Attorney General.

Public lands—Contracts of purchase, binding upon State.

When the State sells its land and issues its certificate of sale for the same, agreeing upon the payment of a certain amount by the purchaser to give him a deed of said lands upon the payment by the purchaser of said amount, he is entitled to a deed, and the State has no right to require the payment of delinquent taxes charged against said lands prior to the issuing of the certificate of purchase.

The State has no more right to depart from the terms of its contracts than any private citizen.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, September 26, 1892.

HON. M. D. CHATTERTON, *Lansing, Mich.:*

DEAR SIR—Referring to your request for my opinion relative to the duty of the Commissioner of the State Land Office to issue you a deed for lot No. 7, block No. 117 of the city of Lansing, I would say:

This description of land was sold to Mary E. Wiley on the 21st day of November, 1867, and a certificate of purchase was issued November 23d, 1868.

I understand that you are the assignee of the said Mary E. Wiley and are entitled to all the rights of the original purchaser.

It appears by the communication from the State Land Office to you of July 14, 1888, that there were certain taxes charged against said

premises for the years 1859 to 1867 inclusive, amounting to $52.17; that there are no delinquent taxes charged against said lands subsequent to the issue of the certificate of purchase above referred to; that the Commissioner of the State Land Office refuses to issue a deed for this land, by reason of the charges against said land for taxes from 1859 to 1867 aforesaid.

I do not understand how these taxes were charged against a description of land owned by the State. But waiving that question, I am clearly of the opinion that under the holdings of our court in the case of Robertson *vs.* Land Commissioner, 44 Mich., 274, the State has no right to refuse to issue a deed to you on the ground that there are delinquent taxes charged against such land prior to the issue of the certificate of purchase.

The certificate of purchase is a contract between the State and the purchaser of the lands, and in such capacity, the State has no more right to depart from the terms of such contract than any private citizen.

The certificate of purchase agrees, upon the payment of a certain sum, to issue to the purchaser a deed of said lands. This certain sum has been paid, and the State certainly can not, at the present time, impose any condition which was not inserted in the contract at the time of purchase. However, as was said in the above case, the State does not release any tax lien by giving the deed, and there can be no objection to the deed containing a recital to that effect, if the State authorities shall deem it prudent to insert one.

Respectfully,
A. A. ELLIS,
Attorney General.

Registration.

New registration is not required in townships outside of the county of Wayne, in fall of 1892.

Registration is required in the fall of 1892 in the townships outside of the city of Detroit, in the county of Wayne.

Registration is required in the fall of 1892 in cities organized under the general law, or under a special charter which requires it.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, September 26, 1892.

HON. D. J. CAMPAU, *Detroit, Mich.:*

DEAR SIR—Your favor requesting me to give you a statement of what I deem to be necessary in the matter of registration this fall is received.

The general law governing registration in this State is Act No. 177, of the Laws of 1859.

In 1881, section 18 of said act was amended by act No. 142, requiring a new registration of the qualified electors of each organized township and city in this State, at the session of the several boards of registration next preceding the general election of 1882, and every ten years thereafter, excepting in the county of Wayne, and except in those cities where pro-

vision is made by existing law for a new registration oftener than every ten years.

This section was again amended in 1882 (See act 24 of the Public Acts of that year), but the clause above quoted was not affected by the amendment.

In 1883 said section was again amended, and all of that part of the section requiring a new registration every ten years stricken out or omitted.

The law requiring a re-registration every ten years was never intended to apply to the county of Wayne, nor to those cities where provision is made for a re-registration oftener than every ten years. Under the law as it now stands, no re-registration is required this fall in the several townships of the State outside of the county of Wayne. All cities incorporated under the general law are governed by that law, and cities incorporated by special acts are governed by the several acts incorporating them.

The general law for the incorporation of cities requires a re-registration in the year 1880, and every four years thereafter. (Section 2424 Howell's Statutes.) This would, of course, require a re-registration this fall in all cities organized under the general law.

Registration in the county of Wayne outside of the the city of Detroit is governed by section 121 of Howell's Statutes. This section requires a re-registration in 1872, and on the first Monday of October every four years thereafter, and hence a re-registration would be required in the county of Wayne, outside of the city of Detroit, this fall.

Respectfully submitted,

A. A. ELLIS,
Attorney General.

Time of certifying tickets—Furnishing cuts—Duties of committees in certifying tickets.

The statute concerning the certifying of tickets twenty days before election is directory merely, and the board of election commissioners may waive the time and print the ticket, provided it can be done ten days before election.

It is the duty of the board of election commissioners to furnish the cuts of vignettes at the expense of the county.

A political party may authorize either the State, district, or county committee to certify to all of its tickets, and if properly certified by any of such committees, it is no concern of the board of election commissioners.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, October 15, 1892.

HENRY I. ALLEN, ESQ., *Schoolcraft, Mich.:*

DEAR SIR—Your favor asking for my opinion:

First, "Is the clause in section 12 of act number 190 of the Public Acts of 1891, requiring tickets to be certified to the board of election

commissioners twenty days prior to election, mandatory, or may the board waive the time?"

Second, "Whose duty is it under the law to furnish the cuts from which to print the several tickets?"

Third, "What committees must certify the ticket?" is received.

I think the clause concerning the certifying the ticket twenty days before the election is directory merely, and the board would have a right to waive the time and receive the tickets, if properly certified, at any time, provided they should be furnished so that the board could print and have a proof copy of the ballot on file at the office of the county clerk, open for inspection by candidates, at least ten days prior to election as provided in section 11 of act 190.

There is a similar clause in section 3 of act number 194 of the Public Acts of 1891, and I made a similar holding in March, 1892 (see opinion, page 212 of Attorney General's report 1892).

It is not the object of the law to disfranchise any person, and a holding that would make this clause mandatory would be very liable to disfranchise a part of the people, or deny to them the right of having the ticket of their choice properly printed. No good purpose could be served by such a holding.

In reply to your second question:

That is answered by the last paragraph in section 12 of act number 190 of the Public Acts of 1891:

"It shall be the duty of the board of election commissioners to provide, at the expense of the county, a sufficient number of cuts of the several vignettes provided for in this act from which to print the necessary number of ballots to be distributed by them."

Under the above clause it would be the duty of the board of election commissioners to furnish the cuts at the expense of the county.

In reply to your third interrogatory:

Section 10 provides: "It shall be the duty of the State, district or county committee of each political party to forward to the said board of election commissioners of each county in the State, not less than twenty days prior to any such election a copy of the vignette adopted by them and the names of all candidates nominated at any regularly called convention, at which condidates for any of the offices mentioned in section one of this act shall be nominated."

The duties of State, county and district committees are a part of the party government. If a political party sees fit, it is my opinion, under the above clause, that it could have all of their tickets certified by either the State, district or county committee. It is no concern of the board, if the ticket is properly certified, which committee certified to them, and under the plain language of the statute, it may be certified by either.

The penal provisions of the law against any false certification are sufficient to protect the public against any fraud, and the board of election commissioners should not attempt to pass upon the right of the committee to certify a ticket.

Respectfully,

A. A. ELLIS,
Attorney General.

Elections—Counting ballots—Voting twice for same person.

Where an elector votes twice for the same candidate and for no other candidate for the same office, it will count one vote for such candidate.
If an elector votes for two men for the same office, when there is only one officer to elect, both votes are void.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, October 27, 1892.

JAMES M. POWERS, *Charlotte, Mich.:*

DEAR SIR– Your letter asking "when a candidate for office is nominated on two or more tickets, and a cross is put before his name on each ticket, or a cross is placed in the square under the party head of each ticket, on which the name is printed, if there is no cross before the name of any opposing candidate nor under the party head of the opposing party, is the party who has been voted for twice entitled to one vote, or should the ballot be counted as blank?" is received and considered.

In reply would say that when a candidate is voted for twice as you suggest, or in any other way, if there is no vote cast on the same ballot for any opposing candidate, said candidate who received the two or more votes, is entitled to be credited one vote. It only amounts to indicating in two or more ways that you desire to vote for the one candidate. The ticket is all one ballot and the fact that the voter has indicated in more than one way that he desires to vote for any candidate on the ballot, is no reason why he should lose his vote, or the candidate be deprived of the credit. There is no uncertainty as to the intention of the elector.

If an elector votes for two men for the same office, when there is only one officer to elect, both votes are void, because the board cannot tell which of the two men was the real choice of the elector. But if an elector votes twice for the same candidate, and for no other candidate for the same office, then the board can readily see that the intention of the elector was to vote for such candidate, and as the rights of no other person intervene, such candidate is entitled to one vote.

This question was presented to my office last spring by parties from Vassar. The opinion in that case, which contains a sample ballot illustrating this point, will be found in the Attorney General's Report for 1892, page 182.

See also:

People *vs.* Holden, 28 Cal., 124.
Cushing Law and Prac. of Leg. Assemblies, section 106.
McCrary on Elections, section 506.

Respectfully,
A. A. ELLIS,
Attorney General.

Elections—Distinguishing marks on ballots.

A decision as to whether irregular marking upon a ballot is a distinguishing mark must be governed largely by an estimate of the intention of the voter, or of the significance of his mark in each particular instance. No inflexible rule on the question can be laid down.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, November 25, 1892.

J. T. RYAN, ESQ., *Muskegon, Mich.:*

DEAR SIR—Your favor requesting my opinion as to what constitutes a "distinguishing mark under section 36 of the election law," is received.

A decision as to whether irregular marking upon a ballot is a distinguishing mark must be governed largely by an estimate of the intention of the voter, or of the significance of his mark in each particular instance. No inflexible rule on the question can be laid down.

Denman, J., says in Philips *vs.* Goff, 17 Q. B. D., 805, 35 W. R., 196, "It is no doubt better not to turn into a point of law a question like this which can be better dealt with at the place by the commissioner, with his experience and knowledge of the ways and habits of the class of persons who vote at these elections."

Where a statute specially declares that an identifying mark shall avoid the ballot, as in this case, the rule seems to be that ordinary deviations, due to awkwardness or carelessness, are not to be regarded.

Haswell *vs.* Stewart. 1 Ct Sess., 925.
2 O'Malley & Hardwicke, 215 (1874).
Robertson *vs.* Adamson, 3 Ct. Sess., 978 (1876).

The rule has also been stated as follows: "Whenever the court is convinced that the irregularity was the result of awkwardness, or a stiff, heavy or trembling hand; of carelessness; or an attempt to correct the supposed defect; or to make a line more clear or more straight, wherever, in short, it appears that the additions to the required cross, or the form of the cross, or its embellishments, are owing to an unskilled hand, rather than to a desire to identify one's self," the ballot should not be rejected.

Dionne *vs.* Gagnon, 9 Queb. L. R., 20 (1883).

Whenever it can be reasonably inferred from the marking that there was an honest design to mark the ballot correctly, and not an intention so to mark the paper that it could be identified, the ballot should be counted.

Hawkins *vs.* Smith, 8 Can. Supr. Ct., 676 (1884).

It has been held that informalities alone should not vitiate the ballot when the intention is clear; neither should additions or embellishments, nor placing the mark in an improper place, as placing it at one side of the square.

Grant *vs.* McCallum, 12 Can. L. Journ., 113 (1876).

With these general rules, I think there is no difficulty in the way of

determining whether any mark on the ballot is an identifying mark or not.

Respectfully,
A. A. ELLIS,
Attorney General.

Registration—Time and place of—Circulation of dodgers on election day—Effect of illegal registration.

Places of registration may be changed without affecting the validity of the election, if due notice is given and the distance is not too great.
There can be no legal registration after five o'clock of the day of registration.
The votes of people illegally registered must be sufficient to effect the result of the election in order to furnish grounds for a contest.
The circulation of dodgers on the morning of election urging the candidacy of some particular person, is not in violation of the law.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, November 25, 1892.

J. B. BEVERLEY, ESQ., *Hillman, Mich.:*

DEAR SIR—Your favor submitting several questions is received.

As a general rule registration must be made at the time and in the manner substantially as prescribed by the statute.

State *vs.* Commissioners, 20 Fla., 859.

It is also, in general, essential to the validity of a registration that it be conducted at the place fixed in the statute. The removal to another place near by, of which all the voters have notice, and upon which they acted, would not in my opinion render the registration void. But, on the other hand, the removal to a place a considerable distance away, of which sufficient notice is not given, and by means of which a portion of the electors are deprived of their rights, would render the registration void.

You do not state whether any notice of the change was given, or not. If it can be shown that, by the action of the board of registration, a sufficient number of electors were deprived of their right to register, and consequently their right to vote, so as to affect the result of the election, such election could, in my opinion, be set aside.

McCrary on Elections, Section 104.

The rule is undoubtedly the same in this class of cases as that which prevails respecting the place of holding an election.

In the case of Farrington *vs.* Turner, 53 Mich., 27, our court held that an adjournment of election in good faith from one polling place to another would not sustain proceedings in the nature of *quo warranto* against the successful candidate, in the absence of any showing that, if the change had not been made, the result would have been different.

Second, The board of registration have no right to re-open the session for the purpose of registering voters after five o'clock (Section 91 Howell's

Statutes). And a registration of names after that time would not be a legal registration.

State *vs.* Commissioners, 20 Fla., 859.

But where a person is registered he is *prima facie* legally qualified and entitled to vote; and this presumption includes everything required to make him a qualified voter.

Harbaugh *vs.* Cicott, 33 Mich., 250.

This presumption, however, might be overcome, and if it can be shown that a sufficient number of voters was illegally registered, so as to affect the result of the election, the election might be set aside.

Third, The rule just stated would govern your question concerning the supervisor taking the names of persons for registration, without making any examination as to their qualifications.

Fourth, I do not think the circulation of dodgers on the morning of election amongst the electors, urging the election of any certain candidate or candidates, would be in violation of section 33 of the election law.

Respectfully,
A. A. ELLIS,
Attorney General.

Fees of county treasurer—Issuing of tax deeds—Statutory construction.

The county treasurer is not authorized to collect any fee for the issuing of any deed, except in cases where the deed is a second deed, as provided by section 79 of the tax law of 1891.

Rule stated for statutory construction when the word "said" is used in referring to antecedent words or phrases.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, December 21, 1892.

DOLOR MONTPETIT, ESQ., *Sault Ste Marie, Mich.:*

DEAR SIR—Your favor requesting my opinion as to whether parties applying for a tax deed under section 79 of the tax law of 1891, would be required to pay the sum of fifty cents to the county treasurer in cases where the deed is a first deed, or only when such deed is a second deed, is received and considered.

Section 65 of the tax law requires the county treasurer to issue a deed to the purchaser of lands sold at tax sales and makes no provision for his compensation.

Section 78 requires the county treasurer, on the presentation and surrender of the certificate of the purchase of State tax lands, to issue to the purchaser, his heirs or assigns, a deed of conveyance. No compensation is provided for the issuing of this deed.

The first clause in section 79 requires the county treasurer in case of the loss of the certificate of sale of State tax lands, after due proof thereof, to execute a deed for the land described in said certificate.

The last clause in section 79 requires the county treasurer to issue a

second deed in all cases in which he shall be satisfied by sufficient proof that the original deed and records have been lost or destroyed.

This last clause is immediately followed by this provision:

"Before the execution of (such) said deed the party applying therefor shall pay to the county treasurer the sum of fifty cents."

In my opinion the language just quoted only refers to the issuance of second deeds under said section, and does not refer to those issued in the first instance.

The word "said" is usually held to refer to the last antecedent, whether it be a word or a clause to which it can properly apply, and not to include the clause preceding the last.

Fowler *vs.* Tuttle, 24 N. H., 9.

Sutherland on Statutory Construction states the rule to be that relative and qualifying words and phrases, grammatical and legal, where no contrary intention appears, refer solely to the last antecedent.

See section 267, page 349. Numerous cases are cited in support of this proposition.

A similar clause is found in the tax law of 1889, and I find that the Auditor General's department has always construed it to mean the payment of said fee upon the issuance of a second deed only.

It is my opinion, therefore, that the county treasurer has no authority to make any charge for issuing a first deed for lands sold for 1888 taxes.

Very respectfully,

A. A. ELLIS,

Attorney General.

Insurance of steam boilers—Who entitled to do business of.

The American Employés Liability Insurance Company of New Jersey is entitled to do steam boiler insurance in this State.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, December 31, 1892.

MESSRS. MOORE & MOORE, *12 and 13 Campau Bld., Detroit, Mich.:*

GENTLEMEN—I have examined the opinion of the Attorney General of the state of New Jersey relative to the right of insurance companies to do steam boiler insurance under the third subdivision of the insurance act of that state; and, while it seems to me that this construction is hardly supported by the statute, yet as he is the highest law officer of that state, his opinion it entitled to great weight, and probably in view of the fact that his opinion would be followed in New Jersy, I shall be governed by such interpretation. I shall, therefore, relying upon the opinion of the Attorney General of New Jersey, file a copy of such opinion with the Commissioner of Insurance of this State and a copy of this letter, and notify the commissioner of my conclusion.

It follows, therefore, that that the American Employer's Liability Insurance Company of New Jersey has a right, under the proper certificate from the Commissioner of Insurance of this State, to do steam boiler insurance.

Very respectfully,

A. A. ELLIS,

Attorney General.

Salaries—Payment to de facto officers.

The public cannot recover back salaries paid to *de facto* officers.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 7, 1893.

CHAIRMAN OF BOARD OF SUPERVISORS OF LIVINGSTON COUNTY, *Howell, Mich.:*

DEAR SIR—I have received a letter from Mr. Luke Montague, stating that the board of supervisors are in session and are about to commence proceedings against Louis E. Howlett for the money he drew while acting as county commissioner of schools, amounting to $1,500, and stating that before they do so they desire to learn my opinion as to whether they can legally recover the money.

It will be unnecessary for me to repeat the facts in this case, as they are fully set forth in the case of the People of the State of Michigan, *ex rel.* Attorney General *vs.* Louis E. Howlett, decided in the Supreme Court December 22, 1892.

It is sufficient for me to say that Mr. Howlett exercised the duties of the office to which the board of supervisors of your county attempted to appoint him, and received the salary, and that his right to hold the office has been impeached by the Supreme Court. The rule in all cases between individuals is well established that where money has been paid under a mistake of law, it cannot be recovered back.

If the same rule applied to a county, that would dispose of this whole matter.

It is held in this State that the county, after it has once paid the officer *de facto*, cannot afterwards be compelled to pay the officer *de jure*. Such a holding would seem to imply that the public could not collect back the money, because if they could collect back the money from the officer *de facto*, they then in equity and good conscience should pay it over to the officer *de jure*. And again, it does not seem to me there would be any equity at all in permitting a board of supervisors to name a man to an office, and then after he had performed the services, compel him to pay back the sums that had been awarded him for the work performed.

There does not appear to be any great number of decisions bearing upon this question. I have been enabled, however, to find one case, United States *vs.* Badeau, 130 U. S., 452.

In that case an officer was paid a salary while he was acting as an officer *de facto*. The court says: "Inasmuch as the claimant, if not an officer *de jure*, acted as an officer *de facto*, we are not inclined to hold that he has received money which in justice and good dealing he ought to return."

It strikes me that the principal laid down in that case is correct, and that there would be no justice in requiring Louis E. Howlett to return to the county of Livingston the money that has been paid him while he was actually performing the duties of commissioner of schools, and I give it as my opinion that the court would not compel the money to be refunded.

Very respectfully,
A. A. ELLIS,
Attorney General.

Bonds of county treasurer—Acceptance of by Auditor General.

The tax law of 1891 does not authorize the Auditor General to require a bond of the county treasurer.

But if such bond is furnished by the county treasurer, the Auditor General may accept the same, and the State could recover thereon should the county treasurer violate its provisions.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 17, 1893.

HON. H. R. PRATT, *Deputy Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor of January 16, asking "whether it is incumbent upon the Auditor General's department to call upon the county treasurers to file with the Auditor General bonds as heretofore, conditioned that 'such treasurer, his deputy and all persons employed in his office, shall render a just and true account of all moneys received by him or them, belonging to the State, and that he or they shall faithfully and promptly pay to the State Treasurer all such sums of money received as aforesaid according to law.'" And further: "If such bond is voluntarily filed by the county treasurer shall it be received and filed by the Auditor's department?" is received and considered.

The law of 1891, which repeals the tax law of 1889, does not contain any provision requiring bonds to be filed. This, no doubt, was an oversight, as the law should contain a provision requiring such a bond.

I have drafted an amendment to the tax law of 1891, and I have no doubt but it, or a similar provision will be adopted by the Legislature, requiring the county treasurer to give a bond to the Auditor General, to be approved in the same manner and with the same conditions as are provided in section 78 of the tax law of 1889. As the law now stands there is no statute requiring or authorizing the Auditor General to demand such a bond. If, however, the county treasurer voluntarily gave a bond, with proper sureties, I think it would be the duty of your department to file the same, and I have no doubt the State could recover thereon should the county treasurer violate the provisions of such bond, notwithstanding the fact that there is no provision requiring the same.

Supervisors St. Joseph *vs.* Coffenbury, 1 Mich., 355.

It would be safe in answering questions of county treasurers, relative to furnishing bonds, to say that an amendment had been drafted and submitted to the Legislature, amending the law by inserting a provision requiring this bond, and that if a bond with the same conditions given in the law of 1889 should be forwarded, it would be received by your department.

Respectfully,
A. A. ELLIS,
Attorney General.

Taxes—Of whom should be collected—Liability of township treasurer—Levy.

The township treasurer should collect the tax assessed on the mortgage from the personal property of mortgagee.
A township treasurer who neglects to collect such tax from the personal property of the mortgagee, when the mortgagee has personal property situated within the county, would be personally liable to the mortgagee.
A township treasurer has a right to go into any township within his county for the purpose of seizing personal property for the payment of taxes.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 19, 1893.

L. B. MILLER, ESQ., *Township Treasurer, Constantine, Mich.:*

DEAR SIR—Your favor of the 17th inst. making the following statement: "A $5,000 mortgage interest was assessed to a party last May, living in Nottowa township, that a month or two afterwards the mortgagor paid the mortgage in full;" and asking the three following questions:

First, "Should I collect this tax assessed on the mortgage from the personal property of the mortgagee or the mortgagor?

Second, "Can either party make me individually liable for neglecting to collect this money from the personal property of the other?

Third, "Would the law allow me to go to another township and make the levy?" is received and considered.

Section 12 of act No. 200 of the Public Acts of 1891 provides among other things: "All property shall be assessed as of the second Monday of April."

It was the duty of the supervisor in the spring of 1892 to assess this property against the mortgagee as of the second Monday of April, he having the mortgage at that time.

Section 17 of act No. 200 of the Public Acts of 1891 expressly provides that the interest in the property owned by the mortgagee shall be assessed to him.

Section 15 of the tax law contains this clause: "The supervisor shall estimate, according to his best information and judgment, the true cash value of every parcel of real property and interest therein, and set the same down opposite each parcel; the value of the interest of the owner of the fee, less the value of the mortgage or other interest therein shall be set down opposite the names of the owner and occupant, and the *value of the interest in such real estate represented by a mortgage, deed of trust, or other obligation, shall be set opposite the name of the owner of such interest.*"

Section 27 of the tax law provides how the assessment shall be made, and that the total tax assessed against any one valuation or parcel of property shall be *added* and *carried* out in the *last column, upon the right hand side of the roll*, and that "the taxes thus assessed shall become at once a debt to the township from the persons to whom they are assessed."

Section 35 of the tax law provides: "If any person shall neglect or refuse to pay any tax *assessed to him*, or upon any mortgage or other obligation taxed as an interest in lands *owned by such person, as provided by this act*, the township treasurer shall collect the same by seizing the personal property of such person to an amount sufficient to pay such tax,

fees and charges for subsequent sale, *whenever the same may be found in the county*, from which seizure no property shall be exempt."

This last quotation answers not only your first question but your last question as well.

Inasmuch as the property is assessed as of the second Monday of April, it is your duty to collect this tax from the man who then owned it and against whom it was assessed. For that purpose he can go into *any township in the county*.

Section 28 also throws some light upon this matter. It provides that the supervisor shall annex a warrant to the assessment roll, signed by him "commanding the township treasurer to collect the several sums mentioned in the *last column of such roll* * * * and such warrant shall authorize the treasurer in case any person named in the assessment roll shall neglect or refuse to pay his tax, to levy the same by distress and sale of goods and chattels of such person."

It is therefore plainly your duty to collect the tax on this mortgage from the person who owned it the second Monday in April. If he has not the mortgage now, he was the owner assessed last April. It was assessed as an interest in real estate, and he owned it then, and he can not escape his obligation to pay his taxes by changing the form of his property after the assessment is made and prior to the time that the tax is due.

Second, As the above will sufficiently answer your first and third questions, in reply to your second question would say that the law makes this tax a lien upon the real estate of the mortgagor, and should you neglect to collect the same from the personal property of the mortgagee situated in your county, he would be obliged to pay it, and if the mortgagee has personal property in the county the mortgagor would be damaged by reason of your neglect of duty. You therefore, having injured him by your negligence, would be liable to repay to the person so injured his tax with whatever costs might accrue to him by reason of your neglect. If the mortgagee has no personal property in the county, of course you would not be liable to the mortgagor by reason of returning the tax uncollected.

It is expressly held by our Supreme Court in the case of Raynsford *vs.* Phelps, 43 Mich., 342, that "a public officer is liable to private individuals for injuries resulting to the latter from his failure to perform ministerial duties in which the latter has a special or direct interest."

The case in which the above decision was made is very strongly in point with the case which you submit. In that case one who had purchased the equity of redemption of certain mortgaged lands, after a tax had been assessed thereon, had certain personal property on the land, but the tax collector falsely returned that he found no personal property, and the tax became a lien upon the land, from which the owner of the mortgage had to redeem after foreclosure. And it was held that the owner of the land had a right of action against the collector for injury resulting to him in being compelled to redeem from the tax sale.

Respectfully,
A. A. ELLIS,
Attorney General.

Power of Auditor General to cancel sales for State tax lands under tax law of 1869.

Under the tax law of 1869 the Auditor General has no power to cancel or set aside sales of State tax lands on the ground that such sales were void, when there has been a deed issued for the same.

His power is expressly limited to setting aside sales of such a character before a conveyance is issued.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 20, 1893.

HON. STANLEY TURNER, *Auditor General of the State of Michigan, Lansing, Mich.:*

DEAR SIR—Your favor of Jan. 18, stating that "In October 1871 Bush & Armes bid off the southeast quarter of the southeast quarter of section 14, town 13 north, range 5 west for taxes of 1870, deed not issued. At the same time the parcel was held by the State as State tax land for taxes of 1869. Again, at the sale in October, 1874 the same parties bid off the parcel for taxes of 1873, deeded in March, 1881. The land being at that time held by the State as State tax land for taxes of 1869 and 1872.

"At the time that Bush & Armes bid off the land for the taxes of 1870 and 1873, section 1085 of Howell's Statutes was then in force. Especial attention is called to the proviso in the closing words of this section. The State continued to hold the parcel as State tax land for taxes of 1869 and 1872, and subsequently the State's interest was increased by bids for taxes of 1874, 1875, 1876, 1877, 1878 and 1879. The title for this group of years was purchased April 15, 1884, by Alexander Brodie, and at the same time deeded to him for the taxes last aforesaid. The owner of the title in fee now applies to have the sales to Bush & Armes for taxes of 1870 and 1873 and to Brodie for taxes of 1869, 1872, 1874, 1875, 1876, 1877, 1878 and 1879 canceled and set aside, for the reason that they were all made in contravention of the proviso in section 1085 of Howell's Statutes," and asking my opinion as to "whether your department should cancel and set aside said sales or not," is received and considered.

The tax law of 1869 to which you refer, section 84 of the act (section 1085 of Howell's Statutes) contains a provision that every description of land embraced in said notice, which has been bid off to the State at private sale, and which remains unredeemed, or otherwise disposed of, shall be bid off to the State by said county treasurer; and any sale made in contravention of this provision, shall be absolutely void and of no effect."

There can no doubt, under this provision, but what the sales made to Bush & Armes were void, and had no conveyance been issued your department would have been authorized to set aside the sales and treat them as void. The department, however, after receiving the money on the last sale deeded the lands, and subsequently in 1884 sold and deeded the lands to Alexander Brodie for all the taxes then remaining unpaid.

The office of the Auditor General is a ministerial office, and unless authorized by statute, would have no judicial powers. The authority of your department to set aside sales made in contravention of section 1085 it seems to me must be controlled, and to a large extent limited, by section 1101 of Howell's Statutes, which is section 100 of the same tax law. That section expressly limits the power of the Auditor General to cases where no conveyance has been issued.

So much of said section as applies to the case at hand reads as follows: "Whenever any lands returned to the office of the Auditor General on account of non-payment of taxes thereon, if the Auditor General shall discover before the *conveyance* of said lands is *executed* and *delivered*, * * * that such sale was in contravention of section 84 of this act (section 1085 Howell's Statutes) * * * he shall withhold a conveyance of such lands and shall, on demand, cause the money paid therefor to be refunded to the purchaser, with interest thereon at seven per cent."

It will be observed that this section expressly points out the way the Auditor General shall proceed if he discovers land has been sold contrary to the provision of section 1084, and while this section provides for the course that the Auditor General, under such circumstances, must pursue, it must also be construed to be a limitation upon his powers.

A further reason why your department would not be authorized to set aside these sales is found in section 1092 of Howell's Statutes, which is section 91 of the same tax law. That section provides that the Auditor General shall issue a deed to the purchaser, unless the sale of lands shall have been redeemed or annulled, which deed shall be *prima facie* evidence of the regularity of all the proceedings, from the valuation of the land by the assessor to the date of the deed inclusive, and of title in fee in the purchaser.

So far as your office may know these lands may have changed hands a number of times since the State deeds were given. The granting of these deeds gave a *prima facie* title to the purchaser. He has, therefore, a vested right in the lands, and his title can not be set aside without a hearing in the courts on some proper proceeding.

In my opinion, your department has no authority, under the circumstances of this case, to set aside and cancel the sales described in your letter.

Respectfully,
A. A. ELLIS,
Attorney General.

Liquor tax—Failure to collect—Liability of county to township.

Where the county treasurer only collects a portion of the liquor tax, he is required to pay over to the townships only one-half of the amount actually collected. Any default on his part to collect the full amount of such tax does not render the county liable to the townships for the amount not collected.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 26, 1893.

WILLIAM J. GALLAGHER, ESQ., *Deputy County Clerk, St. James, Mich.:*

DEAR SIR—Your favor stating that there are three saloons in the township of Chandler, Manitou county, and that the county treasurer has only collected from said three saloons the sum of $275 dollars toward the payment of the tax required by section 1 of act 313 of the Public Acts of 1887, that said saloons have been doing business since the first day of May last; and requesting my opinion as to whether the county treasurer is entitled to keep one-half of the $275, or whether the said township of Chandler can make the county pay the said township one-half of what

the said county treasurer should have collected under the law from said saloons, is received and considered.

It is very plain from your statement that your county treasurer has neglected to perform his duty, as section 4 of the liquor law expressly requires that every person intending to engage in the business of selling intoxicating liquors shall, on or before the first day of May, in each year, pay to the county treasurer, in advance, the taxes required by section one of the act.

Section 9 of the general liquor law requires that one-half of all the moneys paid to the county treasurer under the provisions of said act, after deducting his fees, etc., shall be by him placed to the credit of the township, village or city from which the same was collected, and shall be by such county treasurer paid over on demand to the treasurer of such township, village or city.

It is my opinion that this section only requires the county treasurer to pay one-half of the moneys actually collected.

So far as collecting that portion of the tax belonging to the townships, the county treasurer acts as the agent of the townships and not of the county. The money thus collected by him for the townships does not go into the county treasury at all, but constitutes a separate fund, with which the county has nothing whatever to do. The treasurer accounts directly to the municipalities for such moneys, and it is his duty to pay them over to the township treasurers on demand.

See Marquette *vs.* Ishpeming Treasurer, 49 Mich., 244.

In that case the county treasurer collected the liquor taxes which belonged to the city of Ishpeming, but did not pay them over to said city, nor did he pay them to the county, but he was a defaulter to a large amount. The court held that the county did not guarantee the integrity of its officers, and was not legally bound to answer for their misconduct. There are much stronger reasons for saying in this case that the county would not be liable to the township, as the taxes have never been collected by the treasurer, and the county should not be held responsible for the failure of its treasurer to perform his duty towards the townships in this regard.

Very respectfully,
A. A. ELLIS,
Attorney General.

Taxes.—Collection from mortgagee—Seizure of property.—Liability of tax collector.

Where a mortgage has ceased to be a lien on the real estate, and where there was no contract in the mortgage requiring the mortgagee to pay the taxes assessed, if the mortgagee has personal property in the county, and the collecting officer neglects to collect the tax of the mortgagee, he would be holden to the mortgagor for the damages resulting from his negligence.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, January 26, 1893.

WILLIAM H. FRANKHAUSER, ESQ., *City Attorney, Hillsdale, Mich.:*

DEAR SIR—Your favor of Jan. 23, in reference to the question of procedure by tax collectors against the personal property of mortgagees, and

asking "What shall I do with this portion of section 17 of the statute: 'That if the said mortgagee shall neglect or refuse to pay the tax assessed to him as holder of any such mortgage, deed of trust, or other obligation, the treasurer shall proceed to collect the same of the mortgagor (not mortgagee) or holder of said real estate, in the same manner as is provided by law?'" And further asking, "Has not the paper reported you wrong, and should it not read as I have indicated above in the brackets?" is received and considered.

In reply would say that the paper quoted me correctly. The question submitted was as to the liability of the tax collector if he failed to collect of the mortgagee.

The law can not be understood by reading alone the portion of the section which you quote. When the act is taken together and the object of the law is considered, it was clearly the intention of the Legislature that each person should be personally responsible to the State for the taxes assessed on his property. The clause to which you refer, although somewhat loosely drawn, was, in my opinion, placed there for the purpose of adding additional security for the State in case the collector is unable to collect the tax of the mortgagee. This appears from the following:

Section 15 provides that the value of the interest in real estate, represented by a mortgage, shall be set opposite the name of the owner of such interest.

Section 27 provides that the total taxes assessed against any one valuation or parcel of property shall be added and carried out in the last column upon the right hand side of the roll.

Section 28 contains provisions concerning the warrant, and it provides that the supervisor shall annex a warrant to the assessment roll commanding the township treasurer to collect "the several sums mentioned in the last column of such roll. And the said warrant shall authorize the treasurer in case any person *named in the assessment roll* shall neglect or refuse to pay his tax, to levy the same by distress and sale of the goods and chattels of such person."

Inasmuch as the tax collector is to collect "the several sums mentioned in the last column of such roll" and the sum assessed against a mortgage is set down opposite the name of the mortgagee, it necessarily follows that the direct command of the warrant is to collect the sum of the mortgagee. But if it was necessary to make this provision more clear, section 35 of the tax law provides "If any person shall neglect or refuse to pay any tax assessed to him, or upon any mortgage or other obligation taxed as an interest in lands owned by such person, as provided by this act, the township treasurer shall collect the same by seizing the personal property of such person to an amount sufficient to pay such tax," etc.

In discussing the tax law in the case of the Common Council of the City of Detroit *vs.* Board of Assessors of the City of Detroit, 51 N. W. Rep., 791, the Supreme Court uses this lansuage: "The mortgagee may and should pay the tax." And then speaking of this provision in the law to which you refer, which allows the mortgagor to pay and then charge it over to the mortgagee, further says: "And if he (the mortgagee) fails to do so, the State appropriates so much of the funds which the mortgage represents—so much of the mortgagee's estate in the land, as is necessary to pay the tax."

In case the mortgage still remains an existing obligation upon the land, or if there is a contract agreement in the mortgage that the mortgagor

shall pay it, the mortgagor could not be damaged by reason of the neglect of the officer to collect of the person against whom the tax was assessed, and of course would not have an action for negligence in such case against the collector.

It was urged in the case above cited that the law was unconstitutional because under certain circumstances it allowed the tax assessed against the mortgagee to be collected of the mortgagor. The court quoting from the case of Robertson *vs.* Land Commissioner, 44 Mich., 274, says: "It must, no doubt, be admitted that the State may provide modes for collecting its revenues that will seem harsh, unreasonable and arbitrary."

It cannot be said that a clause which is put in there for the express purpose of giving the State an additional remedy for collecting its tax, can be construed as a reason why a collecting officer shall neglect the plain commands of the law, and his warrant, to collect the tax of the person against whom it is assessed.

I am clearly of the opinion when the mortgage has ceased to be a lien on the real estate, and where there was no contract in the mortgage requiring the mortgagor to pay the tax assessed on the mortgage, if the mortgagee has personal property in the county, and the collecting officer neglects to collect the tax of the mortgagee, he would be holden to the mortgagor for the damages resulting from his negligence.

The clause referred to in that part of section 17 quoted by you, assumes that there is a valid mortgage existing on the real estate. This is seen by the further provision of the same section, that if the mortgagor pays the tax he may deduct it from the interest or principal of the mortgage. But that language has no application to the case we are considering—a case where the mortgage has ceased to be any obligation against the real estate. The tax may be a lien upon the real estate but the mortgage has ceased to be such.

At the time the mortgage was assessed, the party who owned it had so much property invested therein, and if since that time he has converted it into some other class of property there is no more reason for him now to escape his tax than as though the tax had been assessed on any other class of property, the form of which was subsequently changed.

The fact that the State has an additional remedy to collect the tax, would not discharge the collector from his obligations in the premises, neither does it release the mortgagee from his obligation to pay his tax.

It was held by our Supreme Court in the case of Raynesford *vs.* Phelps, 43 Mich., 342, that "a public officer is liable to private individuals for injuries resulting to the latter from his failure to perform ministerial duties, in which the latter has a special or direct interest."

The case in which the above decision was made is very similar in point of fact to the matter now under consideration. In that case one who had purchased the equity of redemption of certain mortgaged lands, after a tax had been assessed thereon, had certain personal property on the land, but the tax collector falsely returned that he found no personal property, and the tax became a lien upon the land, the mortgagee had to redeem from this tax after foreclosure. It was held that the owner of the mortgage had a right of action against the collector for injuries resulting to him by reason of the negligence of the officer.

Hence, I should dispose of the clause to which you refer by holding that its object is to give the State an additional remedy to collect its

revenue, by providing that if the tax collector is unable to collect from the party against whom the mortgage is assessed, then he should collect of the mortgagor, but that such clause can not be used by the collector as an excuse for failure to perform his plain duty—where the mortgage has been paid after assessment and before the tax is collected—to collect if possible the tax of the mortgagee, and thereby protect the real estate of the mortgagor from the lien.

Respectfully,
A. A. ELLIS,
Attorney General.

Constitutional law—Defective title—Reference to law formerly repealed—Payment of specific taxes by chartered railroads—Taxation of railroads upon a different basis.

Act 133 of the Public Acts of 1891 is unconstitutional and void for the reasons:
First, The act provides for taxation of railroads under a law which had been expressly repealed;
Second, The law referred to in said act provided for two methods of taxation, hence it is void for uncertainty, as it is impossible to tell which method was intended to be adopted;
Third, The law is void for the reason that it places a different rate of taxation upon the same class of railroad property owned and operated through the same parts of the State.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 1, 1893.

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor of January 30, stating that heretofore the Michigan Central Railroad, chartered under act number 42 of the Laws of 1846, has paid to the State, under section 33 of said act, an annual tax, according to the terms and provisions of said section; that this tax has been regularly paid heretofore as provided in said section, and the company has today made a tender of the amount due under said section 33 of the charter, and asking my opinion whether, in view of the provisions of act number 133 of the Laws of 1891, which was intended to bring companies chartered under special acts under the provisions of the general railroad law as to taxation, the tender above referred to should be accepted or refused, is received and considered.

Section 1 of act number 133 of the Public Acts of 1891 provides: "That every railway or railroad company organized or existing under any special act or acts of incorporation, or special or *general acts* of consolidation, or which has heretofore been taxed under any special act or acts of the Legislature of this State, shall, from and after the thirty-first day of December, eighteen hundred and ninety-one, for all purposes of taxation, be subject in all respects to the provisions of *chapter seventy-five of the Compiled Laws of 1871* and the acts amendatory thereof, the same as if every such company had organized under the provisions of said chapter."

The clause in the above quotation "or general act of consolidation" is not within the title of the act, as the title limits the act to the taxation of "railway or railroad companies organized and existing under any *special*

act or acts of incorporation or consolidation, or which have heretofore been taxed under any special act or acts."

The taxation provided for in said section one is in accordance with the "provisions of chapter *seventy-five of the Compiled Laws of eighteen hundred and seventy-one* and the acts amendatory thereof."

In making the compilation of 1871, the act of 1855, entitled "An act to provide for the incorporation of railroads" and the act of 1871, entitled "An act to revise the laws for the incorporation of railroads" were both retained and made a part of chapter seventy-five.

Section 45 of the act of 1855 (Compiled Laws of 1871, section 2341) provides for the payment by railroads of "an annual tax of one per cent on the capital stock of said company paid in, and also upon all sums of money, whether arising from the net proceeds of said road, from municipal aid, from sale of lands or other sources" etc., which shall be in lieu of all other taxes.

Section 37 of the act of 1871, which is also a part of chapter seventy-five of the Compiled Laws of 1871, provides that "every company formed under the provisions of this act" shall pay an annual tax on the gross receipts of said company computed in the following manner, viz.: Upon the gross receipts to the amount of three thousand dollars (or less) per mile of road regularly operated, one and one-half per cent; upon the gross receipts in excess of three thousand dollars and less than six thousand dollars per mile, two per cent; and upon the gross income equal to or in excess of six thousand dollars per mile, three per cent, which tax shall be in lieu of all other taxes upon the property of said company."

Hence, it will be seen that chapter seventy-five of the Compiled Laws of 1871 contains provisions for two separate and distinct methods of taxation, one on the basis of a *per cent on the capital stock and net income*, and the other a *graduated tax on the gross earnings* of the road. Which of these methods did the Legislature intend to adopt?

But this is not the only difficulty found in this connection. In the year 1873 the Legislature passed a general railroad law (Act No. 198 of the Session Laws of 1873). The title is: "An act to revise the laws providing for the incorporation of railroad companies, and regulate the running and management, and to fix the duties and liabilities of all railroad and other corporations owning or operating any railroad in this State."

Section 13 of article 5 of said act number 198 of the Session Laws of 1873 expressly refers to both the act of 1855 and the act of 1871, and repeals them both, together with all acts or parts of acts inconsistent with the law of 1873.

Section 3, of article 3, of the act of 1873 contained express provisions for the taxation of railroads, and the provisions of that section originally adopted were inconsistent with the tax clause in both the law of 1855 and the law of 1871. In other words, the Legislature of 1891, when providing for the taxation of railroad companies organized or existing under any special act or acts, provided that they should be taxed in accordance with the provisions of one or the other of two laws which had been expressly repealed in 1873.

An examination of the law of 1891 will also further show that by act No. 174 of the Public Acts of 1891, section 3 of article 3 of the general railroad law of 1873 concerning taxation, was further amended so that the law now provides a tax "upon all gross income not exceeding two thousand dollars per mile of road actually operated within this State, two per

cent of such gross income; upon such gross income in excess of two thousand dollars and not exceeding four thousand dollars per mile, two and one-half per cent thereof; and upon all such income in excess of four thousand dollars and not exceeding six thousand dollars per mile, three per cent thereof; and upon all such income in excess of six thousand dollars and not exceeding eight thousand dollars per mile, three and one-half per cent thereof; upon all such gross income in excess of eight thousand dollars per mile of road so operated, four per cent thereof."

Act No. 174 of the Public Acts of 1891 took effect upon the same day as act No. 133 of the Public Acts of 1891. Hence, if act No. 133 is valid, it presents this further difficulty, railroads which were organized under special charters shall pay taxes upon an entirely different basis under a general law from the tax assessed upon the other railroads of this State, organized under the general law.

The above state of facts naturally suggest the following questions:

1. Does the reference in act No. 133 to chapter seventy-five of the Compiled Laws of 1871 revive the said chapter so as to make it effectual to carry into effect act No. 133?

2. If it should be held that a reference to chapter seventy-five of the Compiled Laws of 1871 would revive the same and make it effective for the purpose of taxation of railroads organized under a specific charter, then which method of taxation mentioned in chapter seventy-five did the Legislature intend to adopt?

3. Has the State of Michigan any legal right to pass a law taxing its railroads doing business in the same districts and under the same circumstances, on an entirely different basis?

Act No. 133 of the Public Acts of 1891 makes no mention whatever in its title of reviving chapter seventy-five of the Compiled Laws of 1871. Its title relates to an entirely different matter. The law could not embrace two objects under the constitution of this State. Article 4, section 20 provides: "No law shall embrace more than one object which shall be expressed in its title."

It does not seem to me that the title "An act to provide for the taxation of railways or railroad companies," etc., would give any notice of an intention to reinstate and revive a law that had previously been expressly repealed.

Early in the history of the State we legislated against any law that had been repealed being reinstated except in some definite manner. To that end was enacted what is now section three of Howell's Statutes.

While the statute just referred to does not expressly reach this case, it is a strong indication of the policy adopted by the people of the State, and it is my opinion that the Legislature of the State of Michigan cannot, under our constitution, revive a law which has been repealed, under a title which in no wise refers to the law so revived.

Second, The two methods of taxation provided by chapter seventy-five of the Compiled Laws of 1871 are inconsistent with each other, and even if it was held that act No. 133 of the Laws 1891 revived that chapter, still it would be impossible to tell which of these two methods the Legislature intended to adopt, hence, in such case the law would be void for uncertainty.

Third, I am of the opinion that the Legislature of this State could not legally pass a law which, under the same circumstances, places a different

rate of taxation upon the same class of railroad property owned in and operated through the same parts of the State.

I, therefore, give it as my opinion that act No. 133 of the Public Acts of 1891, so far as the taxation of the Michigan Central Railroad, and other railroad companies organized and operating under special charters are concerned, is void, and that all such railroad companies are taxable under the acts of their incorporation; and that the tender made to you by the Michigan Central Railroad Company for the taxes mentioned in your letter should be accepted.

Respectfully,
A. A. ELLIS,
Attorney General.

Bridges on county lines.—Liability of adjoining townships to build.

Where a bridge across a navigable stream is situated on a county line, it is the duty of the adjoining townships, after receiving authority from the board of supervisors, to construct such bridge, and either township may be compelled by the other to so join in building such bridge.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 8, 1893.

H. E. LYON, ESQ., *Clam Lake, Mich.:*

DEAR SIR—Your favor duly received.

The bridge which you refer to, it appears, is intended to be constructed across a navigable river on the line between the counties of Antrim and Kalkaska.

It seems to me that this bridge falls clearly within the provisions of section 10, chapter 7, of the highway laws which provides "Whenever the commissioner of highways of any two townships in different counties shall determine that an exigency exists requiring that a bridge be constructed on or across the county line between such townships, such bridge shall be built and maintained at the equal joint expense of such townships."

It appears from your statement of facts, that this stream is a navigable one. Section 4 of article 18 of the constitution provides, "That no navigable stream in this State shall be either bridged or dammed without authority from the board of supervisors of the proper county, under the provisions of law."

It seems from your statement, that the boards of the adjoining counties are willing and have given this authority to the adjoining townships, and it would now seem to me clearly to be the duty of such townships to construct the bridge.

Act 62 of the Public Acts of 1889 affords a remedy in case the township of Clearwater refuses or neglects to join in the building of this bridge; of course, if the officers of both townships refuse to join in the building of this bridge, and it is found that it is their duty to do so, they might possibly be prosecuted for misbehavior in office, the same as in any other case, or compelled by *mandamus* to build the bridge, if the cost would not exceed the amount allowed by law.

Goodsell *vs.* Post, 30 Mich., 353.

Respectfully,
A. A. ELLIS,
Attorney General.

Railroads.—Payment of specific taxes.—Duty of Railroad Commissioner.

If act 123 of the Laws of 1891 is valid as, assumed by the Legislature, the specific taxes from railroads brought under the provisions of said act are not due until the first day of July, 1893.

Questions of transportation and the proceedings to control the same are, by the statute, placed in charge of the Commissioner of Railroads.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 13, 1893.

To the Honorable, the Senate of the State of Michigan:

GENTLEMEN—A copy of the preamble and resolution passed by your honorable body on Feb. 8, 1893, relative to the non-compliance of certain railroads with act No. 123, of the Session Laws of 1891, and in which you state "That there are at least two railroads in the State that are now operating and paying taxes under the provisions of special charters granted in 1846, which were, by reason of the passage of act No. 123, brought under the provisions of the general law, and should have paid taxes under said general law from and after the first day of July, 1892, and should, under the provisions of said general law, have carried passengers at two cents per mile," and "the Auditor General and the Attorney General of this State are hereby requested to furnish the Senate, at as early date as possible, all information in their possession, why said railroads have not been compelled to comply with the provisions of act No. 123 and the general laws governing the operations of railroads in this State," is received and considered.

I have examined act No. 123 of the Public Acts of 1891, and if you are right in your conclusion of law and fact that "two railroads in this State organized under special charters were, by reason of the passage of act No. 123, brought under the provisions of the general law" then, in such case, such railroads would be liable to pay a tax from the first day of July, 1892, according to the terms of said act. I should conclude the reason they have not paid the tax is, that the statement on which earnings are based would not be filed in the office of the Commissioner of Railroads until on or after April 1, 1893, and the tax would not be due until July 1, 1893. The statement filed April 1, 1893, embraces all the earnings for 1892.

So far as the question of reduction of transportation is concerned, that, assuming that the roads to which you refer are controlled by the general law, would depend upon two things:

First, The earnings of the road per mile;

Second, The notification by the Commissioner of Railroads after the filing of the report on which the decreased rate is based.

Subdivision 9, section 9, of article 2 of the general railroad laws, so far as it relates to this matter, reads as follows: "That in the future, whenever the earnings of any company doing business in this State, as reported to the Commissioner of Railroads at the close of any year, shall increase so as to equal or exceed the sum of two thousand or three thousand dollars per mile of road operated by said company, then in such case said companies shall thereafter, upon the notification of the Commissioner of Railroads, be required to only receive as compensation for the transportation of any passenger and his or her ordinary baggage, not exceeding in weight one hundred and fifty pounds, a rate of two cents and a half, or two cents per mile as hereinbefore provided."

Hence, I must reply, that so far as the question of tax is concerned, no tax would be due from such railroads under the general law, until they are duly assessed this year.

Second, The question of transportation and the proceedings to control the same, are by the statute expressly placed in charge of the Railroad Commissioner.

If the report of any road doing business under the general law shows that it is earning the necessary amount, the law makes plain the duty of the Commissioner in the premises.

No complaint has been made to this office by the Commissioner of Railroads concerning the matters to which your resolution relates, and I regret that I am unable to give you any definite information as to any steps the Commissioner may have taken concerning any road where report shows that it is subject to the provisions concerning the reduced rates.

Respectfully submitted,
A. A. ELLIS,
Attorney General.

Burial of paupers.—Expenses.—Shipment to Ann Arbor.

Under section 2284 of Howell's Statutes as amended, dead bodies of paupers delivered to friends are to be buried at their expense, and if not so delivered are to be shipped to Ann Arbor.

Shelby, Mich., February 6, 1893.

A. A. ELLIS, *Attorney General, Lansing.:*

DEAR SIR—Would you give me your opinion in regard to burying paupers? Our prosecuting attorney claims that if a pauper dies and his friends do not want the body shipped to Ann Arbor, but ask the overseers of the poor to bury the person at the county's expense, they must do so.

I hold the overseers must deliver the body to said friends or send it to Ann Arbor, and that they have no right to bury the body at the county's expense.

Respectfully yours,
JESSE BEARSS,
Supervisor

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 15, 1893.

JESSE BEARSS, ESQ., *Shelby, Mich.:*

DEAR SIR—Your favor received. My understanding of section 2284 of Howell's Statutes as amended is, that if the dead body is delivered to the friends, it is to be buried at the expense of the friends; and in all cases if it is not so delivered, it is to be shipped to Ann Arbor.

Respectfully,
A. A. ELLIS,
Attorney General.

Extradition—What offenses are extraditable—Meaning of term "other crime."

Every act forbidden and made punishable by the state in which it was committed as a crime or misdemeanor, is extraditable.

The offense of violating the liquor law of this State is extraditable, and comes within the meaning of the term "other crime" found in section two of article four of the constitution of the United States.

The fact that violating the liquor law is not punishable as a crime or misdemeanor in the state to which the fugitive has fled, is immaterial.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 20, 1893.

HON. JOHN T. RICH, *Governor of the State of Michigan, Lansing, Mich.:*

DEAR SIR—Your favor enclosing letter from Hon. Joseph B. Gill, acting governor of the state of Illinois, in which he refuses to honor requisition papers, directed to the Governor of Illinois by your Excellency, for the apprehension of one John E. Alexander, charged with the offense of not having his blinds open on Sunday in his saloon, where intoxicating liquors were sold, also for not paying the tax for the sale of intoxicating liquors, and asking my opinion as to whether Governor Gill has a legal right to refuse to grant the request of your Excellency, for the reasons stated in his letter, is received and considered.

The reasons given by Governor Gill for refusing your request are stated by him as follows: "As neither of these offenses are crimes designated *malum in se*, nor known to the common law as crimes, nor indeed, recognized as crimes in the several states at the adoption of our constitution, but are made such by your statute, I am of the opinion that such offenses were not contemplated by the framers of the constitution, and are not embraced within it."

The constitution of the United States, article 4, section 2, subdivision 2, provides, "A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime."

It will be seen that the offenses embraced in this language are: "treason, felony or other crime."

Our statute does not make the failure to remove screens in a saloon on Sunday nor the failure to pay a tax, a felony; but expressly provides that persons thus offending "shall be guilty of misdemeanors."

The questions then are fairly presented: What is included in the words "other crime?" Do they include misdemeanors created by the statutes of the State? If the words "other crime" include statutory misdemeanors, then the Governor of the State of Illinois should have granted your request. If on the other hand statutory misdemeanors are not included then he rightfully refuses your request. The question as to what is meant by the words "other crime" has been construed by the courts of last resort of different States as well as by the Supreme Court of the United States, and as I am able to answer your question from reliable judicial authority, it will be unnecessary to speculate upon hypothetical cases or to quote from text writers.

In 1860, application was made to the Governor of Ohio to render up one Lago, a free man of color, who was under indictment in Kentucky for enticing a female slave to leave her owner and escape. The Governor

of Ohio referred the matter to the Attorney General of Ohio, and the reasons expressed by the Attorney General for refusing, are very similar to those assigned by the Governor of the State of Illinois in the letter to you.

He said: "Whether, under the federal constitution, one State is under obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offense not known to the laws of the former, nor affecting the public safety, nor regarded as *malum in se* by the general judgment and conscience of civilized nations. * * * * * * * The right rule in my opinion, is that which holds the power to be limited to such acts as constitute either treason or felony by the common law, as that stood when the constitution was adopted, or which are regarded as crimes by the usages and laws of all civilized nations."

Application was made to the Supreme Court of the United States for an order compelling him to deliver the body of Lago. The court refused the writ of *mandamns* on the ground that the Governor of the State could not, in that manner, be coerced in the performance of his duty by the constitutional provision; but the opinion in the case, delivered by Chief Justice Taney and representing the unanimous judgment of the court, has been considered as substantially equivalent in weight to a judicial decision.

Chief Justice Taney said: "The words felony, treason or other crime in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by the State in which it was committed, for it is manifest that the statesmen who framed the constitution were fully sensible that, from the complex character of the government, it must fail, unless the States mutually supported each other and the general government; and that nothing would be more likely to disturb its peace and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offense as soon as another opportunity offered."

See Kentucky *vs.* Denison, 24 Howard, 66.

The opinion of Chief Justice Taney has recently been affirmed by the Supreme Court of the United States in *Ex parte* Reggel, 114 United States, 642. In that case, the court said the words "treason felony or other crime" included every offense against the laws of the demanding state, without exception as to the nature of the crime."

The theory of the Attorney General of Ohio, as stated in the case of Kentucky *vs.* Denison, has not been sanctioned by the Supreme Court of that State, which has held that it is only necessary that the acts should be made criminal by the laws of the demanding States.

Wilcox *vs.* Nolze, 34 Ohio St., 520.
Ex parte Sheldon, 34 Ohio St., 319.

In the State of New York, In the Matter of Clark, 9 Wendell, 212, Savage, C. J., said: "The language is, treason, felony or other crime; the word 'crime' is synonomous with misdemeanor (4 Blackstone Comm. 5)

and includes every offense below felony punished by indictment, as an offense against the public."

In the People *ex rel.* Lawrence *vs* Brady, 56 N. Y., 182, Judge Andrews said: "The word 'crime' in the clause of the constitution which has been quoted, embraces every act forbidden and made punishable by the laws of a State, and the right of a State to demand the surrender of fugitives from justice extends to all cases of the violation of its criminal law. (Kentucky *vs.* Denison.) Felonies and misdemeanors, offenses by statute and at common law, are alike within the constitutional provision; and the obligation to surrender the fugitive for an act which is made criminal by the law of the demanding State, but which is not criminal in the State upon which the demand is made, is the same as if the alleged act was a crime by the law of both.

See also:

People *vs* Donohue, 84 N. Y., 438.

It has been held in Indiana that misdemeanors are embraced in the words "other crime."

Morton *vs.* Skinner, 48 Ind., 123.

And it was held in Massachusetts, in the case of a person charged with selling intoxicating liquors contrary to law in Vermont, that the constitutional provision "extended to a person appearing to be charged with any crime whatever in that state."

See Brown's Case, 112 Mass., 409.

In the Matter of Voorhees, 32 N. J. L., 141, before the Supreme Court of N. J., it was contended that the words "other crime" only embraced crimes which were such at common law, at the time of the adoption of the constitution. Beasley, C. J., held that the words were "*nomen generalissimum*" and embraced every species of indictable offense present and future in the demanding State.

Precisely the same views have been expressed by the Supreme Court of North Carolina in Hugh's Case, Phillips Law (N. C.) 57 and 64. See also Pa. L. J. 424; also *In re* Hooper, 52 Wis., 699. State *vs.* Stewart, 60 Wis., 587.

It was said by Judge Choate in Leary's Case, 10 Ben., 197, in the United States district court for the southern district of New York that "It is now settled by a great preponderance of authority, State as well as federal, that the word 'crime' in this clause of the constitution embraces every species of offense made punishable as a crime by the laws of the State making the demand, even though it were not a crime by the common law or the laws of other States; and even though for the first time made a crime by a law passed subsequently to the adoption of the constitution and the passage of this act of Congress."

Hence, I must conclude that the position taken by the Governor of the State of Illinois is unsupported by the constitution of the United States and the judicial interpretation thereof, and therefore that the Governor of the State of Illinois had no legal right to refuse to grant your request.

Respectfully,

A. A. ELLIS,

Attorney General.

Publishing delinquent tax lists—Allowance of claim for by Board of State Auditors.

Where a party persists in printing delinquent tax lists after the order designating his paper as the paper to publish such lists has been revoked, and he notified to discontinue work, he is not entitled to any compensation from the State for doing such work.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 21, 1893.

The Honorable Board of State Auditors, Lansing, Mich.:

GENTLEMEN—In relation to the account of Wesley N. Featherly, referred to this office, I would say that a statement of the case of Featherly *vs.* Auditor General is found on page 22 of the report of this office for the year of 1891.

The award made to Mr. Featherly was revoked and he requested to return the list to the Auditor General's office on or about January 3, 1891. He refused to comply with the request and commenced a proceeding by *mandamus* to compel the Auditor General to allow him to publish the list, and the court held that the Auditor General had a right to revoke the order. Although beaten in the case, Mr. Featherly did not return the lists.

At one time Mr. Featherly claimed that he had done fifty dollars worth of work prior to receiving Mr. Stone's letter of countermand.

If, as a matter of fact, Mr Featherly had done the work, under some circumstances, he would be entitled to recover the fifty dollars; in this case, however, at the time the Auditor General requested Mr. Featherly to return the list, the party to whom the printing was awarded offered to pay Mr. Featherly any expense he might have been to, if he would deliver the list as requested. He refused to do so, and the State ought not to be made any expense by reason of Mr. Featherly's unlawful action.

It is my opinion that under the circumstances of this case, Mr. Featherly in equity and good conscience, is not entitled to anything from the State.

Respectfully,
A. A. ELLIS,
Attorney General.

Officer—Term of office—Continuing in office until successor is appointed—State Board of Inspectors.

The term of office of the first member of the State Board of Inspectors expires on the 15th day of February, 1893 without reference to the commission, which declares that he shall hold his office for two years.
An officer appointed by the Governor holds his office until his successor is appointed and qualified.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 22, 1893.

HON. JOHN T. RICH, *Governor of the State of Michigan, Lansing, Mich.:*

DEAR SIR—Your favor of February 21, asking whether in my opinion the term of office of Milo D. Campbell, the first appointee under act No.

140 of the Public Acts of 1891, will expire February 15, 1893, or at the expiration of two years from the date of his commission, is received and considered.

Section 1 of act No. 140 provides for the term of office for each of the persons appointed pursuant to that act, "One to serve for two years; one to serve for four years; one to serve for six years; and one to serve for eight years as may be designated by the Governor at the time of their appointment, and at the expiration of the term their successors shall be appointed in like manner for a term of eight years."

Section one further provides, "The first appointments shall be made by the Governor on the passage of this act, or as soon thereafter as may be, and the terms of office of the first appointees shall terminate on the 15th day of February, 1893, 1895, 1897, 1899 respectively."

I have examined the executive journal in the office of the Secretary of State, and I find that the members of the board provided for under said act were each appointed for the term of office provided for in said section one, without reference to the last clause of the section above quoted. Act No. 140 of the Public Acts of 1891 did not take effect until ninety days after the adjournment of the Legislature, and hence the Governor could not have legally appointed the board at an earlier date, as the law speaks only from the time it took effect.

Mr. Campbell was appointed October 2, 1891, and although his commission in terms provides for two years, under the express terms of the act, his term of office expired February 15, 1893.

Under section 228 of Howell's Statutes, Mr. Campbell is authorized to hold his office until such time as his successor is appointed and qualified. That section provides, "The person holding any office, at the expiration of the term thereof, shall continue to hold the same until his successor shall be elected or appointed and qualified." A similar provision is found in section 338 of Howell's Statutes, which has direct reference to commissioners and officers appointed by the Governor. That provision reads as follows: "That in cases where by law, the office does not expire with the term, such officers shall hold the office and continue to act until their successors are appointed and have qualified."

The office in this case does not expire. The object of the law was to make a continuous office, and hence, the above provision is directly in point. Mr. Campbell, as above stated, is authorized to act until his successor is appointed and qualified.

Very respectfully,
A. A. ELLIS,
Attorney General.

Taxes on part paid certificates—Collection and return.

Taxes assessed on lands held under part paid certificates from the State, the title of which is in the State, should not be treated as personal taxes, but if not collected should be returned to the land office as provided in section 91 of the tax law of 1891.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 22, 1893.

C. S. REILLEY, ESQ., *Prosecuting Attorney, Cheboygan, Mich.:*

DEAR SIR—Your favor of February 17, asking whether the county treasurer shall treat the taxes on land held by parties under a part paid

certificate from the State, as personal property, and collect from the township treasurer the State and county taxes, where they have not been collected from the parties living on the land, is received and considered.

Section 9 of the tax law of 1891, provides how these taxes shall be assessed. They are really assessed against the land, although in making the assessment, the fact is stated that the title is in the State.

Section 44 provides that if the township treasurer is unable to collect the taxes assessed against real property he shall make a return to the county treasurer, etc.

Section 91 provides for the return of these taxes by the county treasurer to the State Land office, and how they shall be collected.

I call your attention to the last part of section 9, which expressly provides, "The taxes, if not paid to the township treasurer, shall be returned and collected as hereinafter provided."

The manner "hereinafter provided," is as above stated, and hence the county treasurer would not be authorized to treat such taxes as personal taxes and collect them of the township treasurer, if the township treasurer had not collected of the parties against whom the tax was assessed.

Respectfully,
A. A. ELLIS,
Attorney General.

Constitutional law—Powers of State Board of Dental Examiners—Discretionary powers of boards and officers.

Act 140 of the Laws of 1883, relative to the practice of dentistry in this State is not in violation of the provision in the constitution of the United States, declaring that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Said law vests in the State Board of Dental Examiners certain discretionary powers, and when the board has fairly and honestly exercised their discretion, it is not subject to review or appeal.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 22, 1893.

A. P. METCALF, ESQ., *Secretary of the State Board of Examiners in Dentistry, Battle Creek, Mich.:*

DEAR SIR—Your favor requesting my opinion as to the validity of act number 98 of the Public Acts of 1891, which is an amendment to act 140 of the Laws of 1883, entitled "An act to regulate the practice of dentistry in the State of Michigan," and as to the right of the said board of examiners to exercise their discretion and sound judgment under said law, in determining what colleges have a course of instruction and practice fully equal or equivalent to that of the College of Dental Surgery in the University of Michigan, is received and considered.

I am very clearly of the opinion that the law is constitutional. The State has a perfect right to prescribe the qualifications of persons who practice dentistry within its borders. I think no one would question the right of the State to require every applicant who was not a graduate of the College of Dental Surgery of Michigan, to submit to an examination.

But we have been more liberal than this, and have admitted graduates of certain other colleges without examination.

Such a law is not in violation of the 14th amendment to the constitution of the United States, which provides that no State shall deny to any persons within its jurisdiction the equal protection of the law.

See Bradwell *vs.* State, 16 Wallace, 130.
State *vs.* State Medical Board, 32 Minn., 324.

Inasmuch as the State has a right to prescribe the qualifications of the dental surgeons who desire to practice dentistry within its borders, the power of determining such qualifications must be placed with some board or officer, and the Legislature has very wisely left this matter with a board especially qualified in such matters; and when said board have acted fairly and have justly exercised the discretionary power reposed in them, no one can legally complain.

State *vs.* Gregory, 83 Mo., 123.
State *vs.* State Medical Board. 32 Minn., 324.
Ambler *vs.* Auditor General, 38 Mich., 746.
Houghton County *vs.* Auditor General, 36 Mich., 271.
Mechem's Public Offices and Officers, section 945.
Board of Supervisors *vs.* Auditor General, 27, Mich., 165.

The law leaves it with the board to determine what colleges have a course of instruction and practice fully equal and equivalent to the College of Dental Surgery of the University of Michigan, and they having determined what colleges do have a course of instruction and practice fully equal or equivalent to that of the College of Dental Surgery of the University, and it not appearing in any way that they have abused their discretion in this regard, I, nor any other person, should presume to substitute our opinion as to what colleges are or are not entitled to this distinction.

I give it as my opinion, therefore, that the board has a right, when acting fairly within the discretionary power vested in them by law, to determine what colleges have a course of instruction and practice fully equal or equivalent to that of the College of Dental Surgery of the University of Michigan, and they can refuse to register applicants in accordance with such determination.

Respectfully,
A. A. ELLIS,
Attorney General.

Requisitions—Defective complaints.

A complaint cannot be based on information and belief, but must set up the facts constituting the offense on the knowledge of the person making the complaint. No person can be arrested on the mere belief of the person making the complaint.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 24, 1893.

HON. JOHN T. RICH, *Governor of the State of Michigan, Lansing, Mich.:*

DEAR SIR—In reply to your inquiry concerning the validity of the papers presented on which a warrant for a requisition against Solomon C.

Allen is asked, I would say that I have examined the papers and find that the complaints and warrant are bad. The complaint as set forth in the warrant simply charges the offense of larceny; hence, the additional complaint, in which it is attempted to charge the obtaining of property under false pretenses, would have no bearing upon this matter. And even this does not set forth facts sufficient to constitute the offense of obtaining property under false pretenses.

The complaint proper is that of larceny, which charges that the complainant "Hath just cause to suspect, and does suspect that Solomon C. Allen * * * * did feloniously steal, take and carry away the said horse."

A complaint cannot be based on information and belief, but must set up the facts constituting the offense on the *knowledge* of the person making the complaint; and if he does not know them, other witnesses must be examined who do. No person can be arrested on the mere belief of the person making the complaint.

People *vs.* Heffron, 53 Mich., 527.
People *vs.* McAllister, 19 Mich., 215.
Hackett *vs.* Wayne Circuit Judge, 36 Mich., 334.
Sheridan *vs.* Briggs, 53 Mich., 569.

In my opinion you should not grant the requisition asked for in this case on the papers presented.

Respectfully,
A. A. ELLIS,
Attorney General.

Printing of ballots—Propositions for building court houses.

Where there is a general county ticket voted, the proposition for building a court house should be printed at the foot of the ticket prepared by the county election commissioners.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, February 28, 1893.

RUFUS CAMPBELL, ESQ., *Hillsdale, Mich.:*

DEAR SIR—Your favor asking "Whether the proposition for building a court house should be printed at the foot of the State and county ticket, or whether it should be printed upon a separate ballot, and a separate ballot box provided for the reception of such ballots," is received and considered.

The manner of printing these tickets was covered by sections 490, 491, 492 of Howell's Statutes, prior to the passage of act 190 of the Public Acts of 1891. That act repeals all acts and parts of acts contravening its provisions, and must be construed to amend these sections to such an extent that under the law both propositions should be printed upon one ballot, and opposite each proposition should be the usual square in which the voter is to designate his choice.

The question submitted is a county question, and inasmuch as the gen-

eral law requires two boxes, where there is a township election and a county election being conducted at the same time, the general county box would be all the box that would be necessary for the reception of these ballots.

Section 18 provides, "Whenever a constitutional amendment or other question is proposed to be voted upon by the electors, the substance of such amendment or other question shall be clearly indicated upon the ballot, and below the same upon the ballot shall be placed in separate lines the words "Yes" and "No." The elector shall designate his vote by a cross mark (X), placed opposite the word "Yes" or the word "No."

Last spring the same question was submitted to this office and I then held that it was necessary to have a separate box, and that the tickets should be printed as provided in section 18.

There was no other county ticket at that time, and as the question presented was a county question, it was my opinion that it must be printed upon a county ballot.

I therefore give it as my opinion that inasmuch as there is a general county ticket this spring, the proposition should be printed at the foot of the ticket prepared by the county election commissioners, containing the candidates for justices of the Supreme Court, regents, circuit judge, county commissioner of schools, and other questions which are to be submitted to the electors of the whole county.

Respectfully,
A. A. ELLIS,
Attorney General.

Referring bills to committees—Violation of rules of legislative bodies, effect of.

The constitution does not require any bill pending in either branch of the Legislature to be referred to a committee, and a failure to so refer the bill would not affect the law enacted.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 2, 1893.

HON. JOSEPH R. MCLAUGHLIN, *Lansing, Mich.:*

DEAR SIR—Your question "Does the failure of the Senate to refer a bill to a committee, or the failure to enforce any of the rules of that body adopted by itself, concerning the order of transacting its business in the passage of laws, render any of the bills passed in violation of such rules invalid?" is received and considered.

In reply I would say the constitution does not require any bill to be referred to a committee, and the failure to so refer the bill would not vitiate the law when enacted.

The test is this, the Legislature must, in the passage of bills, observe all of the requirements of the constitution, and if the same thing required by the constitution is also embraced in the rule, of course the enforcement of the rule would be absolutely necessary; but, if the matters provided for by the rules are simply discretionary matters for the guidance of the Senate, their enforcement only concerns the Senate itself, and whatever might be

said of the propriety of a body disregarding its rules, the disregard would not vitiate the legislation.

In speaking of this same matter, Judge Cooley in his work on Constitutional Limitations said: "All those rules which are of the essentials of law making must be observed and followed; and it is only the customary rules of order and routine, such as in every deliberate body are always understood to be under its control, and subject to constant change at its will, that the constitution can be understood to have left as matters of discretion, to be established, modified or abolished by the bodies for whose government in non-essential matters they exist."

Respectfully,
A. A. ELLIS,
Attorney General.

Requisitions for embezzlement—Money received outside of the State—Attaching of warrants.

Where the money is received outside of the State, the application for requisition should be supported by evidence that the money was embezzled in this State.
In such case authority should be shown that action for embezzlement would lie in Michigan.
The copy of warrant for arrest should be attached to the application.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 3, 1893.

HON. JOHN T. RICH, *Governor of the State of Michigan:*

DEAR SIR—I return herewith application for requisition for Albert Munch.

It is my opinion that before requisition should be granted, the prosecuting attorney should be required to furnish evidence that Munch embezzled the money in Washtenaw county, it having been received out of the State.

Second, some authority showing that the action would lie when the money was received out of the State, and the *agent* only had *authority out of the State.* He was an agent *not in* this State, but in Illinois. I should want some authority that in such a case embezzlement would lie in Michigan.

Third, there is no warrant attached to the papers submitted to me, and the officer has not attached his name to the jurat and affidavit attached to papers, and these defects should be cured.

Respectfully,
A. A. ELLIS,
Attorney General.

Elections—Repeal of statutes—Identification of ballots—Ballots of challenged voters should be marked.

Act 180 of the Public Acts of 1877, providing for the identification of ballots in cases of contested elections, is not repealed by the election law of 1891.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 10, 1893.

R. L. ALEXANDER, ESQ., *Supervisor, Plymouth, Mich.:*

DEAR SIR—Your favor asking whether act No. 190 of the Public Acts of 1891 repeals the law providing for the numbering of the ballots of challenged voters, and for the concealment of such numbers, is received and considered.

Act No. 190 of the Public Acts of 1891 only repeals acts and parts of acts contravening the provisions of said act.

It contains no provisions for the identification of the ballots of challenged voters in case of a contest, neither does it contain any provisions forbidding the inspectors of election to provide for the same.

Act No. 190 was intended to take the place of the general election law of 1889, and that in turn was intended to take the place of the law that preceded it, but none of these laws contravene the provisions of act No. 180 of the Public Acts of 1877 entitled: "An act further to preserve the purity of elections, and guard against the abuses of the elective franchise, by providing for the identification of the ballots of unqualified voters, in cases of contested elections," and it is my opinion that sections one, two and three of act 180 of the Public Acts of 1877, being sections 229, 230 and 231 of Howell's Statutes relating to the numbering and identifying the ballots of challenged voters, are now in force.

Respectfully,
A. A. ELLIS,
Attorney General.

Collection fee—When belongs to State and when to county.

Collection fees received on taxes before sale belong to the county, but collection fees included in redemption money, or money for State tax lands, belong to the State.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 14, 1893.

WRIGHT HAVENS, ESQ., *County Treasurer, Grayling, Mich.:*

DEAR SIR—Your favor received and contents noted.

Under the law of 1889, the collection fee received by you on all taxes *before* sale of the lands belongs to the county. The "collection fee" which has been added to the sum for which lands have been sold to the State is a part of the money belonging to the State. Hence, you will understand that when you "collect delinquent" taxes, the collection fee goes to the county, but when you receive sales money, redemption money

or money for State tax lands, the "collection fee" included, belongs to the State.

This would include all the lands sold under the exception clause of section 111 of act 200 of the Public Acts of 1891.

Respectfully,
A. A. ELLIS,
Attorney General.

Small-pox and other communicable diseases—Expenses of townships—State aids.

Under the statute authorizing the Governor to draw upon the general fund, amounts to be used to prevent the spread of cholera or other dangerous communicable diseases, he has no authority to draw upon such fund to assist townships in defraying expenses already incurred, when there is no danger of the further spread of such diseases.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE.
Lansing, March 15, 1893.

HON. JOHN T. RICH, *Governor, Lansing, Mich.:*

DEAR SIR—In reply to your request for my opinion as to your authority under act 230 of the Public Acts of 1885 to draw from the general fund moneys to aid the township of Pittsfield, Washtenaw county, in bearing the expense incurred by such township in taking care of certain small-pox patients, and restraining the spread of such disease, I would say:

Your authority in such case is prescribed in section one of the above act, which provides as follows: "That whenever, in the opinion of the Governor, it may be deemed necessary, he may draw from the general fund, on the warrant of the Auditor General, not to exceed the sum of ten thousand dollars ($10,000), to be used by the State Board of Health, to prevent the introduction or spread, in this State, of cholera or other communicable diseases dangerous to public health."

It will be observed,

First, That the matter of giving aid in any instance is one resting in your sound discretion;

Second, That in no case is the money so appropriated to be used by any other authority than the State Board of Health;

Third, That the money is to be used only "to prevent the introduction or spread" of communicable diseases dangerous to public health.

The application made to you on the part of the said township of Pittsfield, by its supervisor and health officer, is to assist it in defraying the expense already incurred. There is no intimation in such application that the disease is spreading, or is liable to spread, to any dangerous extent. But it is placed upon the theory that the State should aid the township in defraying the ordinary expenses incident upon such occurrences. This, I do not believe, was the purpose of the law. At least it is not so expressed in its title, which reads "An act to provide for the prevention of the introduction and spread of cholera and other dangerous communicable diseases."

In the case of Milan township, where there occurred an outbreak of small-pox, referred to in the communication to you, the circumstances

were rather peculiar, and, in the opinion of Governor Luce, necessitated State aid. In that case the small-pox was prevailing to an alarming extent, and at the same time the chairman of the board of health was placed in quarantine, and the township was without an organized and authorized board of health. Further, it was represented to Governor Luce that there was imminent danger that unless the State took action, small-pox would spread around the State.

Report of State Board of Health, 1890, page 187.

In this case, as I understand it, the disease has been checked, and all danger of its spreading has passed, and the application is for aid to pay bills already contracted.

This fund it very wisely placed at your disposal to be used in cases of emergency to protect the public health, but it seems to me that the application of Pittsfield township comes neither within the spirit nor the letter of the law.

If small-pox was raging in said township at the present time, and there was danger of its spreading, there is no doubt but what you would have authority under this law to draw upon such fund, and place it at the disposal of the State Board of Health to be used by them in preventing the further spread or introduction of such disease.

But under the circumstances of this case as stated, I am of the opinion that you are not authorized to grant the aid asked for by the applicant.

Very respectfully,
A. A. ELLIS,
Attorney General.

County commissioners of schools—Members of boards of education—Women voters.

Under the constitution and laws of this State, women are not entitled to vote for county school commissioners nor for members of board of education, under local act 285 of 1891.

Women are eligible, if otherwise qualified, to the office of county school commissioner.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 21, 1893.

C. R. HENRY, ESQ., *City Attorney, Au Sable, Mich.:*

DEAR SIR—Your favor asking:

1. "Can any woman having property qualifications or children within school age, vote for county commissioner of schools and members of the board of education of the city of Au Sable, school inspectors, or other school officers at the coming general school election?

2. "If they present themselves for registration, is the board of registration in any manner authorized to register their names?" is received and considered.

Section 2 of act 147 of the Public Acts of 1891 provides for the election

of a county commissioner of schools "at the election held on the first Monday of April, 1892 and every second year thereafter."

Both males and females are eligible to election to this office, provided they possess the qualifications enumerated in section 3 of the act.

The law does not, however, define the qualifications of the voters who shall be allowed to vote for the office of commissioner, and the intent of the Legislature must be reached by considering the law in connection with the time and circumstances of the election, and the object sought in the passage of the act.

First, The title of the act makes no reference to extending the elective franchise, or authorizing any other class to vote at a general election, than those already authorized by the constitution and general laws.

Second, The commissioner is to be elected at a general spring election at the same time of the election of justices of the Supreme Court, regents of the University and circuit judges, and as the commissioner is a county officer the name of the candidate must, under section one of act No. 190 of the Public Acts of 1891, be printed on the same ticket with the names of the other officers elected at such general election; and as at such general election no person is entitled to vote unless he possesses the constitutional qualifications of an elector, it must be conclusively presumed that the Legislature only intended that persons possessing the constitutional qualifications of electors should vote for county commissioner of schools.

Third, Your city is incorporated under the general law for the incorporation of cities, which is chapter 80 of Howell's Statutes. Your board of education is incorporated under act 285 of the Local Acts of 1891, and its members are required to be elected at the annual city election, the same as other officers of the city. Section one of chapter four of your charter, which is section 2419 of Howell's Statutes, provides: "The inhabitants of cities incorporated under this act, having the qualifications of electors under the constitution of the State, and no others, shall be electors therein."

Women do not possess the qualifications of electors under the constitution, hence would not be entitled to vote at the annual city election for members of the board of education, or any other school officer required to be elected at such annual election.

It is, therefore, my opinion that women are not entitled to vote for county commissioner of schools, or members of the board of education of your city, and that the board of registration are not authorized to receive their names for registration.

The case of Hodge *vs.* Stebbins, 59 Mich., 156, fully sustains the above opinion.

Respectfully,
A. A. ELLIS,
Attorney General.

Vacancies—Justice of the peace holds until successor is elected and qualified—Resignations.

Where a justice of the peace is elected to fill a vacancy, and the person elected as his successor takes the oath of office, but does not file his bond, and then resigns before term commences, the justice elected to fill the vacancy holds over.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 24, 1893.

WILLIAM BELONGA, ESQ., *Gould City, Mich.:*

DEAR SIR—Your favor received.

A justice of the peace elected to fill a vacancy holds the office during the unexpired portion of the regular term (article 6, section 17 of the constitution, and section 228 of Howell's Statutes), if the person elected as his successor is elected and qualified.

Section 228, Howell's Statutes.

In this case, the justice who was elected for the full term never qualified, as he never furnished the bond required by section 768 of Howell's Statutes. The fact that the justice elected for the full term resigned before his term commenced will not change this rule.

Lawrence vs. Hanley, 84 Mich., 399.

Respectfully,
A. A. ELLIS,
Attorney General.

Sale of State tax lands—Authority of county treasurer—Illegal action of officers—Cancellation of sale.

Where the State holds lands as State tax lands for the years 1883 to 1888 inclusive, and the county treasurer sells the land for only the bid of 1888, his action is illegal and will not bind the State, and the sale can be set aside by the court.
The Auditor General, however, is not authorized to cancel the sale.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 29, 1893.

HON. H. R. PRATT, *Deputy Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor of March 25, stating that "the northwest quarter of the southwest quarter of section 27, in town 26 north, range 4 east, Oscoda county, was held by the State as State tax lands for taxes of 1883, 1884, 1885, 1886, 1887 and 1888, and that the county treasurer has recently reported to your department that in January, 1893, he sold the parcel for taxes of 1888 and gave a deed therefor, leaving the State's title unsold and still remaining in the State for the taxes of previous years; that such sale was made under section 81 and 81*a* of the tax law of 1891," and asking:

First, Does the selling of the land and the giving of the deed for the taxes of 1888 cut off the State's title to the land for the taxes of previous years, and thereby preclude the possibility of collecting the amount due for said previous years for the benefit of the State, county and townships.

Second, Does the law contemplate that where the State has a title for several years, the title for any one or more of the years can be sold, leaving the State's title to the other and previous years unsold on the hands of the State; and,

Third, If the sale is irregular and not in accordance with the intent and meaning of the law, can the Auditor General's department cancel it and cause the county treasurer to return the amount paid for the taxes of 1888 to the purchaser," is received and considered.

Section 80 of the tax law of 1891 provides: "Any person may purchase any State tax lands of such county treasurer by paying therefor the amount for which the same was bid off to the State, with interest on the same at the rate of one per cent per month from date of sale." That section has been amended by the present Legislature, but the amendment was not made until after the sale to which your letter refers. Section 81*a* provides, "Upon the payment to the county treasurer as aforesaid, he shall execute to the purchaser a deed conveying all the right, title and interest of the State or county to said tax lands, acquired by virtue of the original sale or sales to the said State or county."

Sections 80, and 81*a* must be considered and read together, because the fact that the law is divided into two sections, when both sections relate to identically the same matter, ought not to change the meaning or intent of the law.

The purchaser, in order to be entitled to a deed, must pay "the amount for which the same was bid off to the State, with interest on the same at the rate of one per cent per month from the date of sale."

The word "amount" means "The sum total of two or more particular sums or quantities," and after the word "date" in section 80 there might have been the words "or dates." But this whole thing is made plain by the consideration of section 81*a*, that "upon payment to the county treasurer as aforesaid," of the "amount," or, in other words, the sum total of the several bids, a deed is given "conveying all the right, title and interest of the State or county to said tax lands, acquired by virtue of the original *sale or sales*."

This language shows conclusively that while the party is to pay simply one amount, that "amount" includes the entire interest of the county and State, whether such interest is by virtue of a sale or sales, and it seems clear to me from an examination of these sections alone, that the county treasurer has no authority whatever to sell the State tax lands unless he received a sum equal to the amount of the sale or sales by which the lands have been bid in to the State.

The above conclusion concerning the meaning of sections 80 and 81*a* is fully sustained by other paragraphs in the same law. It is clear from an examination of the entire act that the State of Michigan in no case parts with any title to the land, unless it sells for all previously acquired titles or interests.

It is not the intention to give to any person who purchases at private sale any different interest or better title than though the lands were sold at auction sale, and had the lands been sold at auction under section 76*b*, no person could purchase at the delinquent sale unless he also took all of

the interest of the State under the State tax land sale, and where the lands are sold at auction, section 76b expressly provides that "any person bidding on any of said lands shall be subject to the requirements, provisions and penalties of section 62."

The last part of section 62 provides that "If any parcel sold under the provisions of this section shall also be offered at the same sale as State tax lands, the purchaser must also at the same time become the purchaser from the State tax land list, and must pay all the remaining taxes assessed for the year for which he purchased with interest thereon; all sales made in contravention of this requirement shall be void."

All of the sections above quoted clearly show that the intention of the law is to require any person who purchases any land to also at the same time acquire all of the interests then held by the State. The reason for this is found in the fact that the sale and deeding of lands for any subsequent year would cut off the interest and right of the State for all previous years.

When tax lands are offered for sale a statement is prepared under section 73 of the act. Section 74 provides "such statement shall exhibit the aggregate amount of all sums due the State on each description of land, including all interest thereon, etc.," and as above said, if the lands are sold at public auction the purchaser must pay the aggregate amount of all sums due the State.

I am of the opinion that if the county treasurer had any authority to sell these lands for the taxes of 1888, such sale would cut off the State's title to the lands for taxes of previous years; but I do not believe that this sale deprived the State of any title or interest in the lands, because I believe that the sale was made in direct violation of the law, and that the county treasurer had no authority whatever to sell the lands for the taxes of 1888; that the party who purchased the lands did not pay the "amount" for which they had been bid off to the State, but only the sum of one bid, to wit: the bid of 1888.

In the case of Sibley *vs.* Smith *et al.*, 2 Mich., 487, the Supreme Court of this State held that the Auditor General could not assume the power to convey lands sold for taxes unless the statute expressly conferred upon him that power. In the case of Crane *vs.* Reader, 22 Mich., 323, it was held that the State Land Commissioner could only sell and dispose of land "in the manner directed by law." In the case of Attorney General *vs.* Smith, 31 Mich., 359, where a patent had been issued by the State Land Commissioner for land not offered at public auction, an information was filed to vacate the same, because issued contrary to the authority conferred upon him; the court said: "No title can be valid which is acquired from the government against law." All persons are presumed to know the law, and the party who purchased of the county treasurer is charged with a knowledge of the powers possessed by such officer, and gets no rights as an innocent purchaser.

Second, Your second question is answered by what I have already said in the above. It would be impossible under the law, as it now reads, to retain an interest for the State on a previous tax after the State had sold for a subsequent tax, and if such a sale was authorized under the law, the sale for the taxes of 1888 would deprive the State of any interest in the land by reason of previous sales.

Third, There is no power in the Auditor's department to pass upon the acts of the county treasurer. That power is vested by law in the cir-

cuit court, and the circuit court can set aside this sale and declare it null and void.

It would be the duty of the county treasurer to notify the party who has purchased the land for the taxes of 1888, that he had no authority whatever to sell the same, and request a surrender of the deed, or in case the party had recorded his deed, take a quit-claim of the same to the State and return to the party the money received. Otherwise, it is the duty of the county treasurer to take proceedings to set aside this deed as issued in a mistake of law.

Respectfully,
A. A. ELLIS,
Attorney General.

Public lands—Withholding from market.

The Commissioner of the Land Office has no authority to withhold from market, for the accommodation of parties, lands which are subject to entry, when they have been applied for and payment therefor tendered by other parties.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, March 30, 1893.

HON. JOHN G. BERRY, *Commissioner, Lansing, Mich.:*

DEAR SIR—Your favor of March 30, stating that "In May, 1892, James Corcoran sent $100.00 to this office to apply on purchase of northwest quarter of southeast quarter of section 16, 34 N., 3 E.

"The law requires that payment on primary school lands shall be $4.00 per acre down, or not less than one-half down with acceptable timber affidavit. (Sections 5262 and 5263, Howell's Statutes.)

"Mr. Glover, deputy commissioner, wrote under date May 25, 1892, acknowledging receipt of money, and said 'on receipt of $60.00 more, under the circumstances, I think a patent should be issued to you.'

"The balance was not paid, but the $100.00 remained and is now in the State treasury. On November 12, 1892, Mr. Glover again wrote, 'on May 25, I wrote the Presque Isle lumber company acknowledging the receipt of $100.00 and also stated that, under the circumstances, I thought on the receipt of $60.00 more a patent would be issued for the land, and I am still of the opinion, and on receipt of that sum the patent will be mailed.'

"March 4, 1893, application was made by Patrick Culligan for the land, and a patent was issued to him. A few days later Mr. Corcoran signified his desire to soon pay the balance and obtain patent. At the request of this office Mr. Culligan returned the patent issued to him," and asking "whether Mr. Glover exercised a proper legal discretion in the matter, and would the application of Mr. Corcoran hold the land? Or would it be necessary to re-deliver to Mr. Culligan the patent issued to him?" is received and considered.

It is my opinion, under the statement made in your letter, that Mr. Glover, deputy commissioner, had no authority to withhold from the market the lands, and that the payment of $100.00 in no way bound the

State. Mr. Culligan having paid the money and received his patent is entitled to the same. I think the case is fully covered by the decision of the court in the case of People *vs.* Pritcherd, 17 Mich., 340. In that case the court says: "Where lands that are subject to entry are applied for and payment therefor tendered, the commissioner has no discretionary power to retain them from market in order to accommodate other parties."

Had Mr. Corcoran paid his $160.00 for this land he would have been entitled to the same, but not having paid the amount required by the commissioner, he has no claim whatever as against one who does deposit the required sum of money.

Respectfully,
A. A. ELLIS,
Attorney General.

Elections—Residence—Precincts—Qualifications of voters.

If an elector moves from one voting precinct to another in the same towship or ward within ten days before election, he can vote in the precinct to which he last moved, if he is properly registered.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 6, 1893.

J. G. HOLMES, ESQ., *Buchanan, Mich.:*

DEAR SIR—Your favor asking whether in my opinion "The removal of an elector from one voting precinct to another within a township or ward, where a township or ward has two or more polling places or voting precincts, within ten days before election, would operate to disfranchise the the elector, if he was properly registered in the precinct to which he last moved," is received and considered.

Section 1 of article 7 of the constitution provides, "No citizen or inhabitant shall be an elector, or entitled to vote at any election, unless he shall be above the age of twenty-one years, and has resided in this State three months, and in the township or ward in which he offers to vote, ten days next preceding such election."

Section 92 of Howell's Statutes provides, "The name of no person but an actual resident of the township at the date of registration, and entitled, under the constitution, if remaining such resident, to vote at the then next election or township meeting, shall be entered in the registry."

Section 128 of Howell's Statutes, which is section 5 of chapter 8 of the same compilation, relative to elections, in cases where a township is divided into two or more voting precincts, provides "The electors of each district shall vote in the respective districts in which they reside and for which they are registered, except such as are required to act as inspectors of election, who may vote at the polls where they act as inspectors."

It will be observed that an elector is only required by the constitution to reside in a township or ward ten days preceding the election, and there is nothing said in that instrument about precincts, neither is there any reference to precincts in the general registration law above quoted, but a person to be entitled to register under that statute is only required to be an actual resident of the township, and to possess the qualifications

prescribed by the constitution, one of which is a residence of ten days in the township (not precinct) prior to the election. It will also be observed that the statute above quoted, providing where a man shall vote, makes no reference to the length of time he shall reside in the district, but simply provides that he shall vote in the district in which he resides.

The constitution definitely fixes the time and place of residence, and provides explicitly that if a person possesses certain qualifications, and has resided in the State three months preceding any election, and in the township or ward ten days, he shall be deemed a qualified elector at such election.

If it can be said then that an elector who moves from one voting precinct into another less than ten days before election, but who does not move out of the township, thereby loses his right to vote, it necessarily adds a qualification or restriction not contained in the constitution, and which is repugnant to its provisions.

I have no doubt that the Legislature may require a person who has a right to vote under the constitution, to exercise that right only in the precinct where he resides, because this would be only to prescribe the place in the township or ward where a right, which he possesses under the constitution, shall be exercised. Such a provision does not add to the qualifications which the constitution requires, but a statute that deprives an elector of the right to vote simply because he moved from one voting precinct to another in the same township or ward within ten days before election, changes the rule prescribed by the constitution concerning residence, and would not, I believe, be sustained by the court.

The case of State *vs.* Williams, 5 Wis., 308, fully sustains this view, and the same principle is enunciated in People *vs.* Canaday, 73 N. C., 198 and Paige *vs.* Allen, 58 Pa. St., 338.

I therefore give it as my opinion that a removal by an elector from one voting precinct to another in the same township or ward less than ten days before election, will not, if he is registered in the precinct to which he last moved, operate to deprive him of the right to vote at the election held in the township or city.

Very respectfully,
A. A. ELLIS,
Attorney General.

Election—Ballots—Irregular marking.

Where a ballot has a straight line in the square at the head of the ticket, instead of the cross required by the statute, it should be rejected.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 11, 1893.

E. H. BLACKMER, ESQ., *Mackinaw City, Mich.:*

DEAR SIR—Your favor enclosing a ballot, which has placed at the head of the Democratic ticket, two straight parallel lines, without any other markings on said ticket, and asking if such ticket is a valid one, is received and considered.

The instructions at the head of the ballot found in the election law of 1891, requires a cross to be placed at the head of the ticket.

Section 26 of the same act provides, "Any elector may mark or stamp a cross in the space below the party name printed at the head of the ballot. If marked *thus* such ballot shall be counted for all the nominees of such party whose names appear upon the ballot in that column."

Where statutes have required crosses to be used in marking, ballots marked with only a single straight line have been held to invalidate the ballot in the following cases: Cameron *vs.* McLennan, 11 Can. L. Journ. 163; Grant *vs.* McCallum, 12 Can. L. Journ. 113; Dionne *vs.* Gagnon, 9 Queb. L. R., 20; Hawkins *vs.* Smith, 8 Can. Supreme Court, 676; Parvin *vs.* Wimberg, 30 N. E. (Ind.), 790.

In the case of Grant *vs.* McCallum, above cited, the court used this language: "I think every reasonable latitude that can be given to an elector as to the form or position of his mark, without a direct invasion of the statute, should be given to him. The act however requires that this mark should be a cross, and it also requires that this cross should be on the right hand side opposite the name of the candidate. I cannot say, therefore, that so far as the mark is concerned, the elector has complied with the act when in its place he puts a single line. I must rather conclude that the elector for some purpose desired to go merely through the form of voting and expressed this intention by placing such a mark there as evidenced his design of not complying with the requirements necessary to allow his ballot to be counted for either of the candidates. The single stroke does not show a concluded intention of voting, for only a portion of that which is the defined figure is thus made. The voter is told that if he puts a cross in a particular place, which is well defined on his ballot paper, his vote will be accepted; if he does not choose to do that, he loses his vote. It may be that at first this rule will work hardly; but soon a matter so easily comprehended will be perfectly known throughout the country. In the meantime the price paid for obtaining secrecy in voting will be the virtual disfranchisement of a small portion of voters who have not learned to vote under the present system."

It seems to me that the rule stated by the court in this case is the one that should apply in this State, and I therefore give it as my opinion that any ballot which has nothing but a straight mark, or two parallel straight marks placed at the head of any ticket, or in the square at the left of any name on the ticket, should not be counted.

Very respectfully,

A. A. ELLIS,

Attorney General.

Lands in the city of Detroit—Title of State to.

The State has no title to that portion of section eight of the Governor and Judges' plan of the city of Detroit, bounded by Rowland, Griswold and State Streets in the said city of Detroit, known as the high school lot.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 12, 1893.

To the Honorable the Board of State Auditors, Lansing, Mich.:

GENTLEMEN—Your favor requesting my opinion as to whether the State has any title in a certain parcel of land formerly occupied as the site of the State capitol, bounded by Rowland, Griswold and State streets in the city of Detroit, is received and considered.

The land referred to is a triangular piece, and is a portion of section 8 of the Governor and Judges plan of the city of Detroit, known as the high school lot.

By an act of Congress approved April 21, 1806, entitled "An act to provide for the adjustment of titles to land in the town of Detroit and territory of Michigan and for other purposes," the Governor and judges of the territory of Michigan were authorized to lay out a town, including the old town of Detroit and ten thousand acres adjacent, with the power to hear and adjust all claims to lots therein and give deeds for the same. Section 2 of said act provided that the land remaining of the said ten thousand acres, after satisfying the claims provided for by section 1, should be disposed of by the Governor and judges at their discretion, to the best advantage, and they were authorized to make deeds to purchasers thereof, and the proceeds of the land so disposed of to be applied by the Governor and judges towards the building of a court house and jail in the said city of Detroit. The court house was used as the capitol building above referred to, and the said Governor and judges were required by said act to make a report to Congress of their proceedings under the act.

In the case of Scott *vs.* Detroit Young Men's Society's Lessee, 1 Douglass, 149, the Supreme Court of this State having under consideration the validity of a deed given by the Governor and judges of the territory of Michigan for lands in said city, on the first day of July, 1836, used this language: "At the time of its execution (referring to the deed) the United States held the unqualified fee of the lot, conveyed and possessed the absolute right to dispose of it as they should deem expedient. They had empowered the Governor and judges of the territory, for the time being, to dispose of it at their discretion to the best advantage by the act which we have before so often referred to."

As this deed was given subsequent to the authority vested in the Governor and judges of the territory, the case of Scott *vs.* Young Men's Society's Lessee cited, amounts to an authoritative statement by the Supreme Court of this State that the act granting certain powers to the Governor and judges did not divest the United States of the title to the lands in question.

By an act of Congress passed August 29, 1842, the powers of the said Governor and judges of the territory of Michigan, relative to said lands, were transferred to the mayor, recorder and aldermen of the city of Detroit. Section 3 of said act provides, "That any land or other property, real or personal, remaining, except the court house and jail erected under the act

to which this is a supplement, after satisfying all just claims provided for in the first section of the act, to which this is a supplement, is hereby vested in the said mayor, recorder and aldermen of the city of Detroit."

In the case of the Board of Education *vs.* the City of Detroit, 30 Mich., 505, it was held that the piece of ground referred to was excepted from the grant of property made to the city by the act of Congress above quoted; that the exception therein made of the court house included the land on which the court house stood, and that the city, although it had power of legislative control and regulation over this property, had no authority over it as a proprietor.

It clearly appears from the language of the United States statutes in reference to this matter, and the holdings of our court in regard thereto:

First, That the Governor and judges of the State of Michigan possessed only the naked power to convey for and in behalf of the general government, and did not possess any title to the land over which they had control, and acted merely as agents for the United States.

Second, That the act of 1842, which vested in the mayor, recorder and aldermen of the city of Detroit all the powers and rights with regard to the plan of Detroit and the land titles therein, which theretofore had been vested in the Governor and judges, and which transferred to the corporation such remaining lands on the plan as were subject to their control, did not vest in the city of Detroit the title to the piece of land in question.

The State of Michigan occupied the court house for State purposes for some time, and finally surrendered the possession of the ground in question in about 1847, and since that time has not exercised any control over the same. The State had no record title, but held by the consent of the government, the title as above indicated remaining in the United States. Without any regard as to what the original title might have been, the land since the date above mentioned, has been in the peaceable possession of those claiming adversely to the State, and even had the State ever had title it could not at this time assert any title against the city of Detroit. For many years the land has been in the possession of the board of education of the city of Detroit, and was until very lately occupied by what was known as the high school building.

Without attempting to pass upon the relative rights of the United States government and the city of Detroit to this piece of ground, it is clear that the State has no right, title or interest in the premises.

Respectfully,
A. A. ELLIS,
Attorney General.

Sale of State tax lands—Notice—Adjournment of sale.

Under the law of 1891 it is the duty of the county treasurer, and not the Auditor General, to publish notice of sale of State tax lands.

When the same description is on both the State tax land and delinquent lists, the sale from those lists of that description must be at the same time, as purchasers are required to purchase from both lists.

Where notice of sale of State tax lands is given by the Auditor General instead of the county treasurer, the mistake may be remedied by adjournment of sale of delinquent lands until the county treasurer has time to give notice of sale of State tax lands.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 13, 1893.

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—My attention has been called by the county treasurer of St. Joseph county to the fact that the notice for the sale of the State tax lands at the tax sale for the year 1893 has been given by your department, instead of by the county treasurer.

The county treasurer of St. Joseph county states in his letter that no other notice, save the one signed by the Auditor General for the sale of State tax lands, has been published in any paper in St. Joseph county.

I learn from inquiry that a similar notice for the sale of State tax lands has been published in the other counties of this State, and so far as I can learn no notice for the sale of State tax lands has been given by the county treasurers.

The mistake was doubtless occasioned by overlooking the fact that the tax law of 1891 provides that the notice, which was previously given by the Auditor General for the sale of State tax lands, shall now be given by the county treasurer.

The sale of delinquent tax lands in 1893 is to be made under and by virtue of the provisions of act No. 195 of the Public Acts of 1889, while the sale of the State tax lands, which is to take place at the same time, is to be made under and by virtue of act No. 200 of the Public Acts of 1891.

Act No. 195 of the Public Acts of 1889 is repealed so far as it relates to State tax lands, hence, the clause in section 69 of act 195 of the Public Acts of 1889, reading as follows: "The Auditor General shall cause to be published for four weeks successively next previous to the day fixed for the annual tax sale," etc., has now no force or effect.

Under the law of 1889 the statement was to be prepared by the Auditor General. Now, under the law of 1891, sections 73 and 74, the Auditor General is to furnish to the county treasurer in the month of February a list of the State tax lands in his office, and the county treasurer is to prepare a list of the State tax lands, which list is to include "lands kept by the Auditor General, and the list kept by the said treasurer."

Section 75 provides: "The county treasurer shall cause to be published for four weeks successively (which shall be construed to mean four publications once a week) next previous to the first Monday of May in the years provided by this act, a notice that the lands described in such statement will be sold by him at public auction at the time and place designated for the regular tax sales."

Section 75 is now in full force and effect, and it was the duty of the county treasurer of each county, under and by virtue of said section, to give notice for four weeks prior to the first Monday of May of the sale of State tax lands.

Both the law of 1889 and the law of 1891 contemplate that the purchaser at a delinquent sale shall also purchase the same lands if offered as State tax lands, and it is provided by the last clause of section 62 of each of these acts, that if any parcel sold as delinquent lands shall also be offered at the same sale as State tax lands, the purchaser must purchase all the land from the State tax land list. "All sales made in contravention of this requirement shall be void."

It is clear to me from examination of act No. 195 of the Public Acts of

1889 and act No. 200 of the Public Acts of 1891, that the county treasurer cannot legally sell any lands for delinquent taxes which should also be offered at the same time as State tax lands until legal notice is given of both sales. It is also clear that no lands can be sold at public auction as State tax lands until the notice provided by section 75 of act No. 200 of the Public Acts of 1891 has been given by the county treasurer.

No notice having been given by the county treasurer for the sale of State tax lands, as provided by section 75, for the sale that is to take place on the first Monday of May, 1893, the question to be answered is: How shall the mistake be remedied?

Under the law the Auditor General might re-advertise the sale of the delinquent tax lands for some other time than the first Monday in May, and the county treasurer could give notice for the sale of State tax lands at the same time. This would necessitate, however, a large expense for the State of Michigan.

Another means is suggested by an examination of section 62 of act 195, under which the delinquent tax lands are to be sold this year. That section provides that "the county treasurer may adjourn the sale from day to day, Sundays and legal holidays excepted," etc.

Hence, one of two courses may be pursued to avoid the difficulty occasioned by the lack of giving the proper notice; either the Auditor General must re-advertise all of the delinquent lands, and the county treasurer give notice for the sale, at the same time, of the State tax lands; or the county treasurer must call the sale of the delinquent lands on the first Monday of May, 1893, and sell from day to day such lands as *are not on the State tax land list*, and then adjourn the sale from day to day, until such time as the requisite four weeks' notice shall be given.

I am aware of the fact that section 75 provides that the notice shall be given, "next previous to the first Monday of May," but the section also provides that the sale shall take place at the same time that the delinquent lands are sold, and the sections in both laws provide, as above suggested, that any sale of the delinquent tax lands shall be void unless the purchaser also purchases the lands offered on the State tax land list.

From the fact that the sales are contemplated to take place at the same time, and from the further fact that section 86 of the tax law of 1891 provides "that no taxes assessed upon any property, or sale thereof, shall be held invalid on account of * * * * * any irregularity, informality or omission, or want of any matter of form or substance in any proceeding that does not prejudice the rights of the person whose property is taxed," it appears to me that the time when the notice is given is simply directory, and if a four weeks' notice is actually given immediately before the time when lands are offered for sale as State tax lands, that would be all that would be necessary to make the sale valid.

The last course suggested will not incur any considerable expense, and, believing it supported by the law, I think it the better method to adopt.

I have therefore prepared a blank notice to be sent to the several county treasures of the State of Michigan, requesting them to fill in the name of the county, the date of the notice, the time when the sale will be made, and cause the same to be published in some newspaper in the county four successive weeks, that is, four insertions, next prior to the date when the sale is to take place, and that as above stated they offer for sale on the first Monday of May only such lands as are not on the State tax land list, and then adjourn the sale of the delinquent tax lands from day to day until

such time as they can legally offer the State tax lands under the notice above mentioned.

What I have above said concerning giving a new notice, of course has no application to any county where the county treasurer has already given the notice required by section 75 of the law of 1891. All such counties, if any there be, will proceed with the sale on the first Monday of May, and there will be no necessity for any adjournment.

Respectfully,
A. A. ELLIS,
Attorney General.

Taxes—Time of payment—Liability as between vendor and vendee.

Taxes on lands do not become a lien until the first day of December, and as between vendor and vendee, under a warranty deed, the obligation is upon the vendee to pay the taxes for the current year where the conveyance is prior to that date, and upon the vendor where it is subsequent.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE.
Lansing, April 20, 1893.

A. B. WHITE, ESQ., *Township Treasurer, Mendon, Mich.:*

DEAR SIR—Your favor stating that A owned a piece of land in your township and it was assessed to him in April, 1892; that A sold such land to B in October following, A removing to another township within the county. A had personal property on which the taxes might have been recovered, but refused to pay the taxes. B, knowing the taxes to be a lien on the land, paid such taxes. The question you submit is, "Has B a legal claim on A for the amount of the taxes paid; also, if B had refused to pay the taxes and the treasurer had returned them as delinquent, could B recover the amount from the treasurer for his neglecting to force collection from A?"

Taxes become a lien upon real property upon the first day of December of the year in which they are assessed, and not before; (Tax Law of 1891.) and as between vendor and purchaser under a warranty deed, the obligation is upon the vendee (the purchaser) to pay the taxes for the current year where the conveyance is prior to that date, and upon the vendor (the seller) where it is subsequent. (Harrington *vs.* Hilliard. 27 Mich., 271.)

It is very clear that there is no obligation resting upon A as between himself and B. to pay these taxes, as the conveyance was made prior to December 1, the time at which the tax became a lien upon the premises.

It follows therefore that B has no claim against A for the amount of these taxes, and the township treasurer acted within his authority in receiving the taxes from B.

Respectfully,
A. A. ELLIS,
Attorney General.

State tax lands--Trespassers--Right to deed.

Where a person wilfully commits a trespass upon State tax lands by cutting timber thereon, and the State seizes such timber and sells it for the tax, that fact would not entitle the trespasser to a deed, but the lands would continue to remain as State tax lands and subject to sale.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, April 25, 1893.

HON. STANLEY W. TURNER, *Auditor General, Lansing, Mich.:*

DEAR SIR—Your favor asking, "In case warrants are issued to seize timber cut on State tax lands, and the taxes are paid under the process and the timber released, should tax deed issue to the party who pays under said process, or does the land continue to be held as State tax lands and subject to be purchased," is received and considered.

The law covers both State tax lands and lands which have been bid into the State where the time for redemption has not expired.

No provision whatever has been made in the law for deeding the land on payment of the taxes.

Any rule which would allow the lands to be transferred in that manner would encourage trespass upon State tax lands, rather than to retard such infringement on the rights of the people.

If a person wilfully commits a trespass upon State tax lands by cutting the timber thereon, he has no reason to complain that the State takes the timber which has been severed from the freehold (and thereby becomes personal property) and sells it to realize sums due the State.

No reason is found why such trespasser should acquire any equity by reason of the actions on the part of the county treasurer in that regard.

It is therefore my opinion that it was the intention of the Legislature that a trespasser, under such circumstances, should not be allowed to acquire any interest in the land, and that even though one pay under such process he would not acquire any right, title or interest in the lands, and that the lands would continue to be State tax lands and be subject to purchase.

Respectfully,
A. A. ELLIS,
Attorney General.

Trust companies--Certificate of organization--Time of filing--Directory statutes.

Under section 16 of act 108 of the Laws of 1889, trust companies organized under act 58 of the Laws of 1871, may file their certificate with the Commissioner of Banking after the time limited in said section 16, the provisions of that section being merely directory. The Commissioner has authority to require such certificate at any time.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, May 16, 1893.

HON. T. C. SHERWOOD, *Commissioner of Banking, Lansing, Michigan:*

DEAR SIR—Your favor stating that the Grand Rapids Safety Deposit Company was organized under act number 53 of the Laws of 1871, as

amended in 1883, with a capital stock of $50,000, $35,000 paid in; that said corporation has continued to do business down to the present time, but has failed to file the certificate in accordance with the requirements of section 16 of act number 108 of the Laws of 1889; that it is now desired to file with the Commissioner of the Banking Department such certificate, that it may be in full accord with all the requirements of the law, and asking whether or not you are authorized at this time to accept such certificate, is received.

The act under which the Grand Rapids Safety Deposit Company was organized is expressly repealed by section 17 of act number 108 of the Public Acts of 1889, but it is provided in section 16 of said act number 108 that "The provisions of this act shall apply to and govern all corporations now existing and organized under act number 58 of the Session Laws of 1871 and amendments thereto, except that any such corporation may continue to do business with the amount of capital stock provided in said last named act, and all such corporations shall, on or before the first day of January next following the time when this act becomes operative, file with the Commissioner of the Banking Department a certificate executed by the president and secretary of such company in substantial conformity to the requirements of the original articles of incorporation provided for in section three of this act."

It will be seen that the only question is whether the clause in section 16 which provides that the certificate shall be filed "on or before the first day of January next following the time when this act becomes operative" is mandatory, and is intended to work a forfeiture of the corporation in case of default, or whether it is directory and comes within one of those provisions of the law which it is the duty of the Commissioner of Banking to enforce, and which might work a forfeiture in case of neglect after a demand made by the Commissioner under and by virtue of the provisions of section 15 of said act number 108.

First it will be obser.ed that section 16 provides that "this act shall apply to and govern all corporations now existing and organized under act number 58." Then follows an exception as to the amount of capital stock, and then an additional duty is imposed upon such corporations, by requiring that they file a certificate with the Commissioner of Banking.

The object of this certificate must be to give the Commissioner of Banking definite information as to the name of the persons, their residence, number of shares of stock, the name of the corporation, its place of business, the purpose of the corporation, the amount of capital stock, and the time when such corporation was organized.

The certificate required in section 16 is really the first report made by such existing corporation to the Commissioner of Banking, and as he is to have supervisory control over such corporation, the object must be solely for information to the Banking Commissioner.

Among other things, it is provided in section 15 that "in case said corporation shall be engaged in carrying on business in violation of the provisions of this act, and shall not cease such violation, forthwith, after notice to it so to do by said Commissioner of the Banking Department, the said Commissioner of Banking Department may with the approval of the Attorney General, apply to a court of competent jurisdiction for the appointment of a receiver for such corporation."

It appears to me, as I have already said, that the object of the first report was to notify the commissioner of the condition of the corporation,

and if the corporation neglected to make its report, it was the intention of the Legislature that the commissioner could proceed under section 15, and in case after request the corporation still refuse to make the report, a receiver may be appointed and the affairs of the corporation settled in the courts. But I see no reason why the failing to file the first report in the form of a certificate should work an absolute forfeiture of the corporate rights of the corporation, any more than would the neglect to make any other report which is required of such corporation.

A corporation already existing at the time of the passage of act number 108 would, under the first clause of section 15, be required to "report its condition and operations as often and on the same dates, and publish the same, as banks doing business under the laws of this State are required to report to the Commissioner of the Banking Department."

It could hardly be said that because a safety deposit company had neglected to make a report on the same dates and publish the same, as required of banks, they had thereby, without any action on the part of the Banking Commissioner, forfeited their charters; and to me there does not seem to be any difference concerning the two cases, and it is my opinion that in case the company refused or neglected to make its first report required under section 16, or any subsequent report required, under section 15, that there is ample power and authority in the Commissioner of Banking to compel the making and filing of such report, or in default to have a receiver appointed, as provided by law.

These reports have reference to the proper, orderly and prompt conduct of the business of the corporation, and are not things necessarily done preceding the right of the corporation to transact its ordinary business.

Judge Cooley in his work on Constitutional Limitations, page 78, lays down the rule as follows: "Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly and prompt conduct of the business, and by a failure to obey which, the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory, and if the act is performed, but not in time or in the precise mode indicated, it may still be sufficient if that which is done accomplishes the substantial purposes of the statute. (See authorities also cited by Judge Cooley under the above head.)

The rights of no party has intervened, and no person can be injured by receiving this certificate at this time. I therefore give it as my opinion that you are authorized at this time to receive and file the certificate provided by section 16 of act number 108 of the Public Acts of 1889.

Respectfully submitted,

A. A. ELLIS,
Attorney General.

Complaining witnesses in criminal cases—Fees.

Where a person merely signs a complaint in a criminal case, but does not attend the trial either upon subpœna or by request of the prosecuting attorney, but voluntarily, he is not entitled to the statutory fees; but if he appears by subpœna, or by request of the prosecuting attorney, he would then be entitled to the fees allowed by law, the same as any other person.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, June 5, 1893.

O. S. Clark, *Prosecuting Attorney, Battle Creek, Mich.:*

DEAR SIR—Your favor asking whether or not certificates should be given to complaining witnesses who simply sign and swear to complaints in justice courts, but who do not appear and testify on the trials and examinations, is received and considered.

Section 9064 of Howell's Statutes provides that "whenever any person shall attend any court as a witness, in behalf of the people of this State, upon request of the public prosecutor or upon a subpœna, or by virtue of any recognizance for that purpose, he shall be entitled to the following fees," etc.

You will see by the above that in case a person attends any court upon your request as a witness, he would be entitled to the fees provided by law, and that would be so even if he were a complaining witness, as the statute makes no destinction as to the proceeding or stage of the proceeding in which the evidence is to be given.

There might therefore be cases in which a person would be entitled to his fees, even though he was only a complaining witness in a case. Ordinarily, however, complaining witnesses go to court upon their own motion and without subpœna, and without request from any party, and the statutes have not provided any fees for such persons. In fact, it would be in the nature of a reward to informers, and while the law presumes that all law-abiding citizens will inform of violations of the law within their knowledge, except in the cases enumerated in the statute where the complaining witness appears on recognizance, or is subpœnaed or requested by the public prosecutor to appear, he is not entitled to fees.

Respectfully,
A. A. ELLIS,
Attorney General.

Michigan Soldier's Home—Authority of Board of Control—Female inmates—Application of appropriation.

The Board of Control of the Michigan Soldiers' Home may, in the selection of sites for the construction of buildings provided for by the act of 1893, use the same site and utilize buildings already on premises.

There is no appropriation for the maintenance of female inmates for the year 1894.

The appropriation made for the construction of a building for the use of female inmates of the Soldiers' Home cannot be used for the support of the Soldiers' Home.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, June 9, 1893.

GENERAL L. G. RUTHERFORD, *Clerk of Board of Managers Michigan Soldiers' Home, Grand Rapids, Mich.:*

DEAR SIR—Your favor of June 8, submitting the three following questions, viz.:

1. "In case the Soldiers' Home Board should decide that buildings now

belonging to the Home can be utilized, would the board be authorized to use any portion of the fifteen thousand dollars in repairing and furnishing same?"

2. "Is there any appropriation for the maintenance of female inmates this year?"

3. "Would the board be authorized to use any portion of the fifteen thousand dollars for that purpose?" is received.

In reply would say:

First, I am of the opinion that the board having been given a right to locate the building "at some suitable spot upon the grounds of the Michigan Soldiers' Home" and "to construct either a dormitory building, cottage or cottages," would have a right to use their own judgment, and locate the buildings upon the same site or sites now occupied by other buildings, and to use such other buildings, so far as in their judgment they can be utilized, for the purpose of constructing the buildings described in the said act of June 2, 1893.

Second, There is no appropriation for the maintenance of female inmates for the year 1893. The act expressly provides that the sum of five thousand dollars is appropriated for the year, A. D. 1894, and section nine of this act authorizes the Auditor General to levy the same for the year 1894.

Third, The board are not in my opinion authorized to use any portion of the fifteen thousand dollars for the purpose of the maintenance of the Home. Section three expressly limits the use to which the fifteen thousand dollars may be applied as follows, namely: "For the purpose of erecting and furnishing said dormitory or cottage buildings."

Respectfully,

A. A. ELLIS,
Attorney General.

Military encampments - Where may be held - Expending of military funds—Concurrent resolutions.

Under the laws as they now exist, the military funds of the State cannot be made available for paying the expenses of an encampment of the State troops on the grounds of the Columbian Exposition.

Under the constitution, the Legislature has ample authority to provide for a drill or encampment outside of the State, but the concurrent resolution of the Legislature permitting it has no effect as a law, and cannot operate to supersede the express provisions of the statute relative to the expending of the military funds.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, June 19, 1893.

HON. JOHN T. RICH, *Governor, Lansing, Mich.:*

DEAR SIR—Your letter of June 14, asking for my opinion as to whether, under the statutes, the military funds can be made available for paying the expenses of the proposed encampment on the grounds of the Columbian Exposition at Chicago, and further asking my opinion as to such other

questions relating to such proposed encampment, as I may deem worthy of consideration, is received and considered.

The constitution, article 17, section 2, provides: "The Legislature shall provide by law for organizing, equipping and disciplining the militia in such manner as they shall deem expedient not incompatible with the laws of the United States." They have provided for the same by enacting act number 16 of the Public Acts of 1862 and the amendments thereto, entitled "An act for the re-organization of the military forces of the State of Michigan," the same being chapter 24 of Howell's Annotated Statutes of this State.

The powers and duties of the Governor and the military board, except as the Governor's authority may be controlled by the constitution of the State, are declared and directed by the act above referred to and the amendments thereto.

Section 4 of article 5 of the constitution provides: "The Governor shall be commander-in-chief of the military and naval forces, and may call out such forces to execute the laws, to suppress insurrection and to repel invasion."

It will be noticed by the above that the authority of the Governor to call out the military forces embraces three classes of cases: First, to execute the laws; second, to suppress insurrection, and third, to repel invasion.

When the Governor calls out the military for the purpose of an encampment, he is acting under the first clause of the constitution above referred to. The statute (section 934 of Howell's Statutes, being section 67 of the chapter above referred to) expressly provides: "The commander-in-chief, by and with the advice of the State Military Board is hereby authorized and empowered to establish, annually, one or more camps in suitable places within the State, for the instruction of State troops, and may procure suitable tents, camp equippage, utensils and ammunition for the use of troops in said camps, and may order into said camp or camps, to be kept there for such period of time as he may deem expedient, not exceeding five days, any company or regiment, and may designate the officers to command such camp or camps; but there shall be at least one regimental drill annually, of each regiment organized under the provisions of this act."

The next section provides that "The authority of the officer or officers in command of the camps respectively, may be extended by order of the commander-in-chief, to a distance of one-fourth of a mile around such camps, and upon such external space, no persons, other than the owners of the same with their servants, for the purpose of occupying and improving the same, in the same manner and way they occupied and improved the same at the time such camp shall be established, shall be allowed to enter, except under such rules as shall be established by the commanding officers of the camps respectively, with the approval of the Governor or by special officer by him designated, and if any person shall so enter he may be immediately expelled."

It is very clear from the above sections that it is the duty of the Governor of the State to establish, within the limits of the State, at least one camp for the instruction of the troops of the State, and it is the theory as well as the direct command of the law that such camps, when so established, shall be under the direct and absolute control of the commander-in-chief and the officers appointed by him, the object being "for the instruction of

State troops." The place designated must be "within the State." The reason for this provision is that the Governor of the State of Michigan has no extra-territorial jurisdiction. He is a State officer, and neither the Governor himself, nor any officer appointed by him, has any authority under the existing laws of the State of Michigan outside of our territorial borders.

The "military fund" to which your letter refers is provided for under section 93 of the same chapter, being section 960 of Howell's Statutes. The provision now in force reads as follows: "For the purpose of providing the expenses necessary to carry out the provisions of this act, it shall be the duty of the Auditor General, at the time of the apportioning of the State taxes, to apportion among the several counties of the State * * * a sum equal to three and one-half cents for each person who it shall appear by the last preceding census was a resident of this State, which sum so apportioned shall be collected in the same manner with the other State taxes, and shall constitute the military fund." The next section provides that "All expenses incurred for the maintenance of the military forces of this State, by virtue of any of the provisions of this act, shall be paid," etc., out of the fund above provided.

It is very clear from section 961 that the uses to which the fund raised under section 960 may be applied are expressly limited to the purpose of providing for the "expenses necessary to carry out the provisions of this act."

The appropriation made is an appropriation expressly limited to a certain purpose, to be expended in a certain way.

Section 5, article 14 of the constitution provides: "No money shall be paid out of the treasury, except in pursuance of appropriations made by law."

The State military fund having been levied, collected and appropriated by the Legislature for a certain purpose, cannot legally be used for a different purpose, or in violation of the plain directions of the statutes.

The paying out of money to pay the expenses or per diem of the State militia to hold a camp on the grounds of the Columbian Exposition at Chicago, would not only amount to paying out money which was not appropriated by law, but it would be the expending of money for one purpose which was expressly appropriated to be expended for another and different purpose.

Under the clauses of the constitution above quoted, the Legislature of the State had ample authority to provide for a drill or encampment on the grounds of the Columbian Exposition at Chicago, as, under the constitution, their authority in such matters would only be controlled by their judgment; but in order to make such provision a change in existing laws would necessarily have had to have been made, extending the right to hold the encampment out of the State, and possibly some other changes relative to inflicting certain penalties that might be in force in case of the disobedience of camp discipline; but for some reason best known to the Legislature itself no such change was made.

The question of holding the military encampment at Chicago was first called to my attention by members of the military board about the 10th of May, 1893, and I at once notified such members that certain changes would have to be made in the laws in order to authorize the expenditure of the money from the military funds. At that time there was pending in the Legislature a bill to amend certain sections of the "Act for the re-organiza-

tion of the military forces" above referred to, which embraced the sections appropriating the money and providing for the State encampment. Subsequently and just prior to the adjournment of the Legislature, the several sections were amended by the Legislature, but no change whatever was made in the sections concerning the place of holding the encampment in 1893; and while section 960 was amended by changing the amount of the tax from three and one-half to four cents per capita, no reference whatever was made to holding the encampment at Chicago in 1893, and no permission was granted for using any of the military funds for that purpose.

This act, which amends the very sections applicable to the question under consideration, was approved by your Excellency June 1, 1893, which was over three weeks subsequent to the time when the matter was being discussed by the military board relative to holding the encampment in Chicago in the year 1893.

The Senate concurrent resolution providing for the holding of the encampment at Chicago for the period of ten days, has no force or effect as a law. The yeas and nays were never entered upon the journal of either house, and no authority can be found giving such resolution any standing as a law. That resolution in terms names a period of ten days for the encampment at the Columbian Exposition grounds, while section 934 expressly limits the authority of the commander-in-chief, by and with the advice of the military board, to command the troops to be kept in camp for a period of not to exceed five days.

The Legislature are presumed to know the law, and hence, they must have known that this resolution, while it might be construed to be a permission or consent on the part of the Legislature for your Excellency and the military board to violate the statutes, cannot under any circumstances be construed as changing or varying the existing laws relative to military encampments.

Under your general request for my opinion concerning any questions relative to the proposed encampment. Fully believing that it is the almost unanimous wish of the State military forces to hold the camp at Chicago this year, and that it would not only be agreeable to our State troops, but would be a source of profit to the State by having an opportunity of showing to our sister states and foreign countries our State army of stalwart, well equipped and well drilled men, I would gladly suggest some legal way by which the State military funds might be used to pay the expenses and per diem of an encampment to be held at the grounds of the World's Columbian Exposition at Chicago; but in the light of the plain provisions of the constitution and the statutes of the State as they now read, I regret that I am unable to suggest to your Excellency any legal way by which the military fund might be used for that purpose.

Respectfully,

A. A. ELLIS,
Attorney General.

Constitutional law—Title of acts—Mining School—Validity in part.

Act 41 of the Public Acts of 1893 is unconstitutional and void so far as it attempts to amend section 7 of act 239 of the Laws of 1887, as it is in conflict with the provisions of the constitution that no law shall embrace more than one object.

That portion of the act making an appropriation for buildings at the Mining School can stand, without regard to the invalid provisions of the act.

STATE OF MICHIGAN,
ATTORNEY GENERAL'S OFFICE,
Lansing, June 30, 1893.

HON. JOHN T. RICH, *Governor State of Michigan, Lansing, Mich.:*

SIR—Your letter referring to the communication from Allen F. Rees, secretary of the Michigan Mining School, and asking my opinion concerning the amendment made by the Legislature of 1893 to section 7 of act No. 239 of the Public Acts of 1887 is received and considered.

The question as I understand it is: Has section 7 above referred to any standing as a law, or binding force by reason of the act of the Legislature of 1893?

Act 41 above referred to is entitled "An act for making an appropriation for additional buildings for the Michigan Mining School of Houghton, Michigan, for the further equipment of the same and for the maintenance and support of said Mining School for the years 1893 and 1894, and to amend section 7 of act No. 239 of the Public Acts of the State of Michigan of the year 1887, entitled 'An act making an appropriation for the erection and equipment of a suitable building for the use of the Mining School at Houghton, in the Upper Peninsula of Michigan, including all permanent fixtures, heating and lighting apparatus, etc.,' approved June 24, eighteen hundred and eighty-seven."

Art. 4, section 20 of the constitution of this State provides that "No law shall embrace more than one object which shall be expressed in its title."

Act 41 of the Public Acts of 1891 embraces two separate and distinct objects:

First, The making of an appropriation for an additional building for the Mining School at Houghton, Michigan; and,

Second, To amend section 7 of act 239 of the Public Acts of 1887.

The objects above expressed are separate and distinct in every respect. One object is to make an appropriation, the other object to amend the law passed by the Legislature at a previous session relating to another matter.

When we examine section seven referred to, that section itself never had but little standing in the act of 1887, but rightfully belongs to the act of 1885.

The question will naturally arise whether or not part of act 41 of the Public Acts of 1893 is good, when it embraces two distinct objects.

The rule is well settled that when the title of the act actually indicates, and the act itself actually includes two distinct objects, where the constitution declares it shall embrace but one, the latter act must be treated as void, from the manifest impossibility of choosing between the two, and holding the act valid as to the one, and void as to the other. Cooley's Const. Lim., 147. But it is said by the Supreme Court of Nebraska in State *vs.* Caldwell, 22 N. W., 228, that "this rule will apply only in those cases where it is impossible from the inspection of the act itself, to determine which act, or rather which part of the act, is void and which part is

valid. Where this can be done this rule does not apply, unless it shall appear that the invalid was designed as an inducement to pass the valid, or that the whole taken together will warrant the valid part alone." Applying this rule to act 41 it will be seen that the main object is plainly expressed in the first part of the title, and the object sought by that part of the act expressed in the first part of the title is fully and fairly carried out without any reference to section seven and the section relating thereto.

Taking into consideration the fact that the main purpose was the appropriation for a public school, which is of great State importance, and that the second part of the title is only an incidental matter relating to another act governing the pay of an employé, it seems to me that there is no doubt that the law should be held good as to the appropriation, and bad in reference to the matter relating to section seven.

I do not wish to be understood, however, to be passing upon the validity of section seven as originally passed under the law of 1887, or the rights of the board thereunder. The resolution of the board, forwarded to me by your communication, is based upon the section as amended by the act of 1893, and it is my opinion that the section as amended in 1893, for reasons before stated, is absolutely void.

Respectfully,

A. A. ELLIS,

Attorney General.

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